

IN THE SUPREME COURT OF FLORIDA  
CASE NO. \_\_\_\_\_

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ANTHONY WASHINGTON,

Petitioner,

v.

MICHAEL W. MOORE,  
Secretary, Florida Department of Corrections,

Respondent.

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PETITION FOR WRIT OF HABEAS CORPUS

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**PRELIMINARY STATEMENT**

This is Mr. Washington's first habeas corpus petition in this Court. Art. 1, Sec. 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, claims demonstrating that Mr. Washington was deprived of the right to a fair, reliable, 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 "R. \_\_\_" followed by the appropriate page number.

All other references will be self-explanatory or otherwise explained herein.

**INTRODUCTION**

Significant errors which occurred at Mr. Washington'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. Washington. "(E)xtant legal principles...provided a clear basis for ... compelling appellate argument(s)." Fitzpatrick v. Wainwright, 490 So.2d 938, 940 (Fla. 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 in 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. Washington is entitled to habeas relief.

#### **PROCEDURAL HISTORY**

On April 12, 1990, a Pinellas County grand jury returned a three-count indictment against Petitioner, Anthony Neal Washington (R. 1-8).

The first count alleged the premeditated murder of Alice Berdat (R. 1). Count two charged that Petitioner burglarized Berdat's dwelling and committed a battery upon her (R. 1). The third count alleged that Petitioner committed a sexual battery upon Berdat using physical force likely to cause serious personal injury (R. 1).

On February 17, 1992, Petitioner's trial counsel filed Defendant's 2<sup>nd</sup> Motion to Compel DNA Records (R. 949). A hearing was held on the motion February 25, 1992. Judge Downey entered his order on the motion February 28, 1992 (R. 863-864).

Petitioner's jury trial took place on July 14-17, 1992, with the Honorable Susan F. Schaeffer presiding, replacing Judge Downey (R. 1979-2754). Prior to the commencement of the trial, Petitioner's trial counsel filed a Motion in Limine attacking the DNA testimony, testing procedures, and probability methods as not being generally accepted in the scientific community (R. 1281-1283).

On July 16, 1992, Petitioner's jury returned verdicts finding him guilty as charged on all counts of the indictment (R. 1505-1507, 2702).

The penalty phase was held on July 17, 1992 (R. 1670-1786, 2738-2754). After receiving additional evidence from the State and from the defense, Petitioner's jury recommended that appellant be sentenced to life imprisonment (R. 1510, 2749-2750).

On August 6, 1992, Petitioner's counsel filed a written memorandum addressing the sentence that should be imposed upon him (R. 1530-1536),

followed by a supplemental memorandum on September 4, 1992 (R. 1553-1566). The State also filed an original and a supplemental sentencing memorandum, on September 1 and 4, 1992 (R. 1544-1552, 1567-1571).

At a hearing held on August 14, 1992, the court entertained arguments from counsel for the State and for the defense pertaining to what sentence Petitioner should receive for the first degree murder (R. 1905-1916).

On September 4, 1992, the court denied Petitioner's motion for new trial, which was filed on July 22, 1992, and imposed sentences (R. 1523-1525, 1918-1977). As to Petitioner's murder conviction, the court overrode the jury's life recommendation and sentenced Petitioner to die in the electric chair (R. 1572-1594, 1625, 1929-1977).

On direct appeal, Mr. Washington's conviction and sentence were affirmed. Washington v. State, 653 So.2d 362 (Fla. 1995). Mr. Washington then filed a Petition for Writ of Certiorari in the United States Supreme Court, which was denied on October 30, 1995, Washington v. Florida, 116 U.S. 387 (1995). On March 1, 1999, Mr. Washington filed his first Motion to Vacate Conviction and Sentence with Special Request for Leave to Amend.

On March 1, 1999, pursuant to Fla. R. Crim. P. 3.850, Mr. Washington filed his Amended Motion to Vacate Judgments of Conviction and Sentence. A hearing was held on August 12, 1999, in accordance with Huff v. State, 622 So.2d 982 (Fla. 1992). On October 5, 1999, the

circuit court issued an order granting an evidentiary hearing on claims I(c), I(d) and I(g), as they pertained to the penalty phase of the trial. The remainder of the claims were summarily denied. An evidentiary hearing was held on November 18-19, 1999. Judge Susan C. Schaeffer entered an order on June 5, 2000, denying all claims of Appellant's 3.850. A timely notice of appeal was filed on July 5, 2000. Contemporaneous with the filing of this petition, Petitioner is filing his Initial Brief on the denial of his 3.850 motion.

#### **CONCLUSION**

Based upon the arguments submitted above, Petitioner prays this court will set aside the affirmance of appeal and vacate judgement and sentence and remand Mr. Washington's case for a new trial.

**JURISDICTION TO ENTERTAIN PETITION  
AND GRANT HABEAS CORPUS RELIEF**

This is an original action under Fla.R.App.P. 9.100(a). See Art. 1, 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. Washington'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. Washington's direct appeal. See Wilson, 474 So.2d at 1163 (Fla. 1985); Baggett v. Wainwright, 229 So.2d 239, 243 (Fla. 1969); cf. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Washington 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. Washington's claims.

#### **GROUND FOR HABEAS CORPUS RELIEF**

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

## ISSUE I

APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE THE ISSUE THAT THE TRIAL COURT ERRED IN NOT CONDUCTING A FRYE HEARING PERTAINING TO DNA PROBABILITIES, AND THEREBY ERRED IN ADMITTING THE DNA EVIDENCE OVER PETITIONER'S OBJECTION IN VIOLATION OF PETITIONER'S FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO STATE AND FEDERAL CONSTITUTION.

### STANDARD OF REVIEW

The standard of review in a case alleging ineffective assistance of appellate counsel is as follows:

A person convicted of a crime, whose conviction has been affirmed on appeal and who seeks relief from the conviction ... on the ground of ineffectiveness of counsel on appeal must show, first, that there were specific errors or omissions of such magnitude that it can be said that they deviated from the norm or fell outside the range of professionally acceptable performance; and second, that the failure or deficiency caused prejudicial impact on the appellant by compromising the appellate process to such a degree as to undermine confidence in the fairness and correctness of the outcome.

Johnson v. Wainwright, 463 So.2d 207, 209 (Fla. 1985); Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Smith v. State, 457 So.2d 1380 (Fla. 1984). Habeas corpus relief is appropriate where appellate counsel failed to raise fundamental error appearing on the record. Lowman v. Moore, 24 Fla. L. Weekly D2554 (Fla. 2d DCA 1999), citing Ferrer v. Manning, 682 So.2d 659 (Fla. 3d

DCA 1996).

Appellate counsel may be deemed to have rendered ineffective assistance in failing to raise a meritorious issue on appeal even if trial counsel did not preserve it for appeal if the error or impropriety rises to the level of a due process violation, constitutional violation, or another matter of fundamental error. Those, of course, cannot be waived by failure to object. See Hargrave v. State, 427 So.2d 713 (Fla. 1983).

Meyer v. Singletary, 610 So.2d 1329 (Fla. 4th DCA 1992).

The Eleventh Circuit has said:

(A) defendant has a right to counsel to aid in the direct appeal of his or her criminal conviction. This right to counsel is violated when appellate counsel is ineffective. This circuit has applied the Supreme Court's test for ineffective assistance at trial, see Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), to guide its analysis of ineffective assistance of appellate counsel claims. Therefore, (Petitioner) must show that his appellate counsel's performance was deficient and that this performance prejudiced the defense.

Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991).

#### **FACTS**

On February 28, 1992, Petitioner's trial counsel filed "Defendant's 2<sup>nd</sup> Motion to Compel DNA Records." (R. 949-951)(Appendix A). In the said motion Petitioner's trial counsel requested, among other things, the following:

g) Copies of the database used in making these statistical probability analysis provided previously in the report. In the event that the database is voluminous, the

Defendant specifically requests that the Court enter an Order allowing his own witness to travel to the FBI and view the database for purposes of assisting the Defendant in the preparation of his case and assisting his counsel in the preparation of the defense.

(R. 950).

A hearing was conducted by Judge Downey upon the motion on February 25, 1992. At that hearing trial counsel argued as follows:

MR. McCOUN: Then Mr. Louderback got on the case. I think he's had it about nine months.

The situation is Mr. Louderback asked me to get involved for two specific purposes. One of them to deal with the DNA. One to deal with the penalty phase.

The motion to compel that we had filed today concerns the DNA aspect of this case. For the Court's information it may have been -- I'll be very brief.

Mr. Washington is a young black male. The victim was an elderly white woman. There is evidence that at the time of the homicide there had been sexual activity, and in fact semen swabs were recovered from the scene.

The swabs, along with numerous other items of evidence, were sent to various agencies. In particular the semen swabs were sent to various agencies. In particular the semen swabs were sent to the FBI in Washington. A DNA analysis was performed in Washington by an FBI expert. The conclusion of the expert was that the DNA analysis conducted on the sperm was a quote, match for the DNA of Mr. Anthony Washington, the defendant in this case.

Thereafter the expert proceeded not only to say that there was a match but also proceeded to indicate that a statistical probability in connection with that Match -- the exact number escapes me right now, but it's a fairly substantial one in -- one in some very large number possibility or probability that it would be somebody other than Mr. Washington.

Well, Mr. Louderback asked me to get involved. We began collecting information, and as I indicated to Judge Luce this morning where I moved for costs in this matter, we have collected probably about a two-inch volume's worth of material from other jurisdictions in which the DNA analysis as performed by the FBI has been subject to legal attacks. And at least in one instance in the DC circuit where the -- with the subject being suppressed.

The basis of the opposition so to speak, the basis of the testimony by those experts who frankly have very distinguished educational pedigrees concerns the method by which the FBI performs not an analysis but takes the analysis and moves into the statistical probability aspect of their DNA work.

These experts have in fact indicated that it is faulty. Not reliable. That the numbers generated by the FBI, because of the lack of appropriate data in the databases, are extremely misleading.

I provided the State about two weeks ago a copy of a motion to suppress that was in fact -- that has in fact been prepared in this case. That is in line with those cases in other jurisdiction where these experts have testified.

Because of a screw-up we didn't have the cost motion -- until today. The cost motion

is designed to allow us to have an expert.

As I indicated I have got about 10 to 12 experts that have been accepted or whose testimony and/or affidavits have been accepted by other jurisdictions and -- in support of the defense position that DNA analysis conducted by the FBI is faulty.

The motion to compel leads into the motion to continue. Without getting totally tongue-tied and overly technical in this thing let me just indicate that the -- what the experts concluded, Judge, is that the numbers, when the FBI gets to the point of scrunching down the numbers and saying this particular match will lead to this particular probability, statistical probability, are faulty because the data information used by the FBI is faulty. And in particular with regards to subclassification for Negro males it is particularly faulty.

They also say that with regards to Hispanics and a couple of other subgroups within the overall "population."

The information sought in the motion to compel is detailed in the motion to compel. It relates to step by step requests for the FBI to produce information that they rely upon. The tangible documents, the databases. The notes, the test results, and so on and so forth of each -- of each aspect of the -- of the DNA analysis.

And I -- in particular in paragraph three I set out the particular steps that are used in the DNA analysis and the information that would be requested. In particular is the database information relied upon by the FBI when this gets to the point of doing the numbers scrunching, and that's where they kick out these probability statistics that have such an incredible

impact in any trial.

This is something that goes beyond a request that would be contained in Rule 3.220, the rules of discovery. Rules of discovery essentially indicate you have a right to get reports and thing of that nature. That goes to the heart of the issue of whether or not we can confront the evidence, the expert evidence and expert testimony that is going to be produced against us.

If the Court looks at the evidence code related to -- related to expert testimony you will see that an expert is entitled to testify in opinion form as to the results of his test on cross-examination and he can do so actually without revealing all of his so-called database or all of the underlying bases of his opinion.

However, on cross-examination he is -- it is permissible to interrogate and require him to produce the bases of his expert opinion.

What Mr. Louderback and I are doing is looking forward to the time when we are going to have to confront this witness at trial or motion hearing and saying that we need this information. One, to be able to present to our own expert who -- we didn't get a lot of money out of Judge Luce, but nonetheless I think we'll have an expert within the next week. So that we can sit down with him, let him begin preparing so he can not only help us in the motion to suppress but also can provide us with testimony that will enlighten the jury at the time of trial.

So what we do by the motion to compel is seek that which we think we're entitled to if we get to the point of trial. Not necessarily what the discovery rule says.

We're actually asking the Court to go beyond the specific working in the discovery rule and looking forward to the point in time in trial to get this information so that we can be prepared for it.

Hand in hand with this, Judge, I have filed a motion to continue...

(R. 2764-2769).

As a result of that hearing Judge Downey entered an order (Appendix B) on April 28, 1992. The order did not require the disclosure of the documents requested in Mr. Washington's motion to compel, nor did the order permit trial counsel to review the documents at FBI headquarters (R. 863-864).

The trial began on July 14, 1992. At the beginning of the trial, Mr. Washington's counsel filed a motion in limine (Appendix C). Paragraph 2 of the motion in limine dealt with the Petitioner's right of confrontation by being denied access to documents and witnesses who performed the DNA testing. Appellate counsel raised on appeal paragraph 2 of the motion in limine regarding the issue of confrontation as it pertained to denial of access to the witness who performed the actual DNA testing.

However, appellate counsel did not raise on appeal the issues argued in the motion in limine in paragraphs 3 and 4, pertaining to the validity of the science of DNA and that the science, as performed by the FBI, was not "generally acceptable

within the scientific community" (R. 1282). Paragraph 3 of the Petitioner's motion in limine states:

3) The DNA analysis performed by the FBI, although purporting to be generally acceptable within the scientific community, is still insufficient and inadequate and not as yet acceptable within the scientific community as a basis for use as forensic evidence in a criminal prosecution. The FBI DNA procedures lack sufficient safeguards, quality control, and procedural regularity to allow the admission of any test results. Additionally, the FBI purports to provide statistical probabilities in relation to the testing procedures done. The databases which comprise the FBI's statistical database are insufficient to allow for such statistical probability. The lack of sufficient subgroupings, for instance, in black male populations is a serious deficiency which destroys the reliability of any statistical probability conclusions as brought by the FBI. Similar to the actual testing itself, statistical probability analysis performed by the FBI is subject to substantial criticism within the scientific community and can not be said to be substantially acceptable within the scientific community, nor, given the database deficiencies can it be found to be relevant.

(R. 1282).

At the time of the trial Judge Downey was replaced by Judge Schaeffer. The following discussions and arguments were conducted:

THE COURT: ...Mr. Bailiff, where are we -- I should announce on the record that this is the case of State of Florida v. Anthony Washington. This case has been assigned for

the duration of this case to a judge other than myself. I don't believe I ever had anything to do with this, although I was in Division M for a while. I don't know how old it is...

(R. 2004).

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I believe there have been certain rulings that have been filed. Those will become the law of the case and I will adopt his rulings, whatever they may have been. Is there any objection from either side to my sitting as trial court for any reason you can think of?

MR. FEDERICO: None from the State, Your Honor.

MR. MCCOUN: No, ma'am.

(R. 2005).

MR. MCCOUN: The only potential problem that I see, and it's based on Your Honor's ruling that those are the previous law of the case, it works itself that way, but this is my wrap-up to a number of motions I filed essentially in the nature of a discovery motion. But setting out why I thought it was more significant than discovery, that it touched upon the constitutional right of Mr. Washington.

The significant evidence in this case took place with Mr. Washington at the scene, other than some circumstantial evidence, other than possession of property, would be DNA evidence introduced. I filed a number of motions to compel, some of which we worked out with the State, others have been denied or granted, usually a little bit of both by Judge Downey.

I set out in a motion in limine that was

filed this morning, that I provided to the State, that I believe the Court should strike any evidence relative to DNA to preserve this gentleman's Sixth Amendment right not only to confrontation, but the right to introduce evidence.

On the DNA evidence, we learned the expert witness was not the person that conducted the testing, the various stages of the testing, but was the person who supervised a technician and the person who drew the final conclusions. We attempted to take a deposition or sought an order from the Court to take a deposition of the technician because we believed it was essential to us in evaluating the tests, the reliability and so on and so forth. That was denied by the Court.

Additionally, we sought to get certain information, such as proficiency testing, matters related to the procedures used by the FBI in order to determine the reliability of a particular technician or expert. These matters were ultimately denied by the Court. We were allowed to get things such as bench notes, which is their ongoing testing notes, and so on.

When I ran this motion, Judge, I appended to it a report entitled DNA Technology and Forensic Science, which was a recent report of April of 1992 from the National Research Counsel.

THE COURT: It's not appended to your motion?

MR. MCCOUN: It was appended to the last motion to compel. I make reference back to it because that particular document, which is prepared by a group of national scientists, which came up with some specific statements relative to how these testings should be done and, in particular, how, as a legal matter and as a matter of discovery and a matter of discovery of protecting an

individual's rights, they should be handled and the FBI takes a different position.

They do not allow you to take a deposition of their technicians. The process started: You can't do that, call our legal office. We did and that led to the motions which were ultimately denied. Several of the things that were pointed out in the motion are contrary to the recommendations and deny Mr. Washington his Sixth Amendment because we know nothing about the proficiency of the qualifications.

THE COURT: Why is the technician who took the test not subject to be queried regarding his test? That won't be the law of the case if you can't convince me that these tests are sufficiently reliable and the person that took the test have the appropriate credentials to do so. You're not going to get it in. That's a matter of predicate. No judge can make a ruling in advance that some test has been done in a fashion where I believe it has relevance to the case.

(R. 2008-2010).

The state then argued to the court that the technician's functions was purely ministerial, they would not be calling the technician as an expert, and that the witness they intended to call was the technician's supervisor (R. 2010-2013).  
Petitioner's counsel and the trial court continued as follows:

MR. MCCOUN: The only thing I would clarify about that, the judge in that case did not rule what this woman did, which was actually perform the individual steps of the DNA procedure, he ruled that is not merely a ministerial function. He ruled that they weren't going to call her and since I got bench notes, I wasn't entitled to take the

deposition.

THE COURT: She is available for you-all to subpoena at trial, so if you really want to talk to this lady, issue a subpoena and talk to her to your heart's content and decide whether or not you're going to use her. For that purpose, I'll issue a subpoena for the lady and you can talk to her all you want to, deposition-wise or without the State's presence.

MR. MCCOUN: Okay.

THE COURT: His ruling was simply as a discovery tool, but that does not obviate the State having to lay a proper predicate to get any expert testimony in. I will assume that they will have to do that or else they will be without a DNA man and you won't have to voir dire prior to the time they try to get it in.

MR. FEDERICO: As far as the overall admissibility, the second part of his motion goes to the admissibility of DNA.

THE COURT: I think that has been decided, as far as the fact that it is generally admissible if its reliability as to the test can be established. That's kind of where the courts in Florida are. I have no ability to really do anything with that, so that's the rule there

Once again, I think they must make the -- they will have to in this course, and in the course of this trial, lay a predicate that there is a sufficient basis for that test to be reliable in this case before I will allow it, although I will generally recognize that court's in Florida have determined that DNA testing in and of itself is generally sufficiently reliable to be allowed to be given to the jury for whatever weight they wish to give it. That, however,

is a general ruling. The specific ruling on this case is yet to be determined, okay?

(R. 2008-2015)(emphasis added).

During the state's case-in-chief, Dwight Adams, an FBI agent, was called to testify and was admitted as an expert in the area of DNA profiles (R. 2459). The questioning by the state began with Mr. Adams explaining the basics of the science of DNA. After which, the following pertinent discussions ensued:

DIRECT EXAMINATION OF MR. ADAMS BY MR. BROWN, ASA

Q. This DNA profile you just described for us with the graphs, is this solely done by the FBI lab?

A. No, sir. DNA analysis or DNA profiling is done by a number of laboratories around the world. A number of state and local crime laboratories in the United States conduct this type of analysis, as well as a number of international labs, such as the FBI equivalent in Canada, Great Britain, Germany, Japan, Australia. A number of laboratories around the world also conduct this analysis.

Q. Is this considered a new technology?

A. This technology has been in existence since the early 1980s. It had its beginning in the forensic field in the mid-1980s, and that's when the FBI began it's research of this technology. And then in 1988 we began working cases using this technology.

(R. 2467-2468).

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MR. BROWN: Do you want to approach regarding the opinions?

THE COURT: No. If you're ready to get into that, I'm going to allow Mr. McCoun to voir dire this witness regarding those matters, if he would like to.

VOIR DIRE EXAMINATION

BY MR. MCCOUN:

Q. Agent, the technician that you have referred to in those terms is a person by the name of Anne Baumstark; is that correct?

A. Yes, sir.

Q. Anne Baumstark is apparently an employee of the FBI?

A. Yes, sir.

Q. Anne Baumstark has not been available for myself or Mr. Louderback to talk in this case, correct?

MR. BROWN: I'm going to object to that.

THE COURT: Overruled.

THE WITNESS: I'm not sure if she has been approached by either you or the prosecutor.

Q. (By Mr. McCoun) Haven't you, in fact, advised me personally and others connected with the court system that you do not let your technicians be available for things such as deposition or inquiry by defense counsel?

A. It's usually redundant to hear the same thing from another individual.

Q. Have you advised me and other personnel in the court system that the FBI does not let these technicians be available for inquiry by defense counsel?

A. Yes, sir.

Q. And in fact, in this instance when the FBI was advised that a subpoena would be coming for this particular person Anne Baumstark, your response was you would be appearing and she would not be appearing; is that correct?

A. That's correct.

Q. Nor do you make available information from this particular person relative to her proficiency testing and other such blind testing that might be conducted by the FBI in order to determine whether or not she is proficient at this type of testing, correct?

A. No, sir, that's not correct.

Q. Have you made it available in this case?

A. Yes, sir. All of my proficiency tests have been conducted in connection with her assistance. All my proficiency tests are also her proficiency tests.

Q. Where are they, sir?

A. I'm not sure that they have been asked for.

(R. 2472-2474).

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Q. Now, you in this instance did not perform the extraction of the DNA from the sample, correct?

A. My technician did under my supervision.

Q. Well, with regards to the next step, the digestion step, you did not perform the necessary steps to digest the DNA, correct?

A. Again, my technician did under supervision.

Q. And when you separated the DNA using the electric current that you talked about, that was done by Ms. Baumstark?

A. The same would apply. I supervised that and determined it was properly performed.

Q. And as we go on down the chart here, when the various probes were applied to the DNA samples that we're dealing with in this case, the probes would have been -- that aspect of the test would also have been performed by Ms. Baumstark, correct?

A. Correct.

Q. Now you say you are her supervisor?

A. That's correct.

Q. And you say that you supervise throughout the testing procedures. Let me ask you with regards to Anthony Washing's case, do you have an independent recollection of any one of those steps that I just talked about, about the extraction, the digestion, the separation?

A. No, sir.

(R. 2475-2476).

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Q. At the same time she is starting four or five given cases, she is going to have how many other hundreds of cases in some various part of this eight-week process?

A. I could have 50 to 100 different cases

somewhere in the process.

Q. You could have, meaning, as in your capacity as a supervisor you could have these in various stages, correct?

A. Yes, sir.

Q. Now, the FBI has decreed that you are the person that is going to testify in court; is that correct?

A. Yes, sir.

Q. The FBI has decreed that it is not the technician who will go to court, correct?

A. Correct.

Q. Now with regards, for instance, let's just pick the digestion -- excuse me, the extraction stage here.

In simple terms, this involves you using some chemical compounds or chemical elements that are designed to extract or to take the DNA from a sample, correct?

A. Yes, sir.

Q. Now, you didn't do that in Mr. Washington's case yourself; it was done by Anne Baumstark?

A. That's correct.

Q. You cannot tell this jury that Anne Baumstark actually extracted DNA from a known sample of Anthony Washington yourself, correct? What you can tell them is according to her notes she did this?

A. That's right, and the photographs that were taken along with the notes.

(R. 2477-2478).

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Q. Do you recognize that document, sir?

A. Yes.

Q. What is that?

Q. This is a copy of the RFLP protocol.

Q. Of the FBI?

A. That's correct.

Q. How many pages is it, sir?

A. That last page is number 34.

Q. Okay. And each page is filled with various steps in the process of arriving at a DNA conclusion, correct?

A. Yes, sir.

Q. And it is your testimony that there are three photographs that enable you to tell this jury that each one of those particular specific requirements of the tests were, in fact, performed by Anne Baumstark?

A. Those three photographs as well as the autoradiographs are sufficient to tell me that each one of the steps were, in fact, performed with reliability.

(R. 2483-2484).

Thereafter, argument was held and the court made the following rulings:

THE COURT: ...What I'm suggesting is where are we here? We're trying to decide whether or not we're going to allow this man to render an opinion?

MR. MCCOUN: Based upon work done by Ms.

Baumstark.

THE COURT: And based upon the testimony I heard here, the clear answer is yes, he worked for a team. He supervised her. Had she made a mistake, he would have known about it. He would have known about it from her notes and her pictures. You can't or haven't contradicted that.

It becomes a matter of cross-examination as to whether or not he is right, wrong or what have you. It becomes a matter of argument whether the State should have produced what you will conclude is an apparent witness to establish what he said is true. But I don't think that goes to the admissibility of his testimony...

(R. 2489-2490).

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THE COURT: Your motion in limine, I believe I have the original of that motion. I guess that at this point the motion in limine has been denied.

(R. 2490).

At that point the state continued with direct examination of Mr. Adams. The testimony regarding the population database and statistical probabilities was as follows:

Q. (By Mr. Brown) We're going to the matching here. There is a statistical probability that you come up with; is that correct?

A. Yes, sir.

Q. Let's explain the statistical figure.

A. The first thing required is to obtain a

population database. You simply go out in the population and you sample, by taking blood samples from individuals, and you perform the same analysis on all of these individuals. You rank them as far as what type of patterns they have based upon this analysis.

Then, you can take an individual, for example, in this case Mr. Washington, and compare him to that population database. The reason you're doing this is to determine if other individuals or how many other individuals could have a similar profile for all three of these results like Mr. Washington.

In this case we have 500 individuals in our black population database which I compared to Mr. Washington's known blood sample.

Q. You say could have had a similar result regarding the three probes. Does the figure change if have the four probes?

A. Yes, sir. It would be less likely that an individual would have four probes like another than it would be if they only had three probes like another individual.

Q. Now when you say you compare them to this database that you have, how do you exactly go about doing that?

A. I sit down at a computer that is programmed to take the data that I have generated from this particular case and I actually compare these profiles to the population database so that I come up with the probability statement. A statement that says that this number of individuals would likely have a similar profile from the black

population.<sup>1</sup>

(R. 2507-2509).

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Q. What is the statistical probabilities that you came up with through the computer on this case?

A. Using just the three probe results that I was able to make an interpretation on the comparing that to our black population database, I determined that the likelihood of finding another unrelated individual chosen at random from that population would be approximately 1 in 195,000 individuals.

(R. 2509).

On cross-examination Mr. Adams admits that there are other scientists in the same field, including the National Research Counsel, that contend that the FBI's method of determining probabilities is faulty.

CROSS-EXAMINATION BY MR. MCCOUN OF MR. ADAMS

Q. You would agree, would you not, that the statistical probability work that is done by the FBI is the subject of some criticism by some others in the statistical probability field that don't agree with the process used by the FBI, correct?

A. I know of a handful of individuals who think that we're not conservative enough. I know of many more people who have actually published articles in the scientific literature who totally agree with the way our statistics are conservatively arrived

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<sup>1</sup>Mr. Adams was not offered as an expert in statistical probabilities.

at.

Q. Let me ask you this, the National Research Counsel has presented a paper, has it not?

A. Yes, sir, they have.

Q. It suggest a statistical probability formula that is different from the FBI's, correct?

A. The formula is the same. The population data would just be more conservatively arrived at.

Q. Do you us the ceiling principle that they suggest in their report that should be used?

A. No, sir.

Q. Well, some other lab or some other agency which performs this type of analysis using their own theories as to probabilities might come up with a different number from that of the FBI, correct?

A. Most of the laboratories I'm familiar with would come up with a figure much larger than we came up with.

Q. So the answer is yes?

A. The figure would be larger, therefore, different.

(R. 2515-2517).

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Q. Does not the National Research Counsel recognize that one of the deficiencies in the FBI's statistical probability work is the lack of consideration of the existence of black subgroups in the United States?

A. They don't specifically refer to it as black subgroups, but they refer to it as sub-populations. But as is stated in the research articles that have been published by the FBI as well as other population geneticists, the conservative nature of our approach is so conservative that it would offset any sub-population difficulties that might arise and, therefore, it really becomes a non-issue.

Q. That's the position of the FBI, right?

A. Not just the FBI. For example, just recently Bruce Ware (phonetic) published a paper in the Scientific Journal of Genetics. Rice and Devlin (phonetic) published a paper in -

THE COURT: Sir, this might be very interesting if it was three o'clock, but it's going on six o'clock. If you'll just answer the question, unless you need to explain your answer. If you need to explain, you may do so.

Q. I'll ask it this way and get a quick answer here and get out of here.

What we're dealing with when we get into this aspect of DNA testing is certain theories that the FBI tries to put into practice, certain theories relative to statistical probabilities, correct?

A. Yes, sir.

Q. There are other, individuals, scientists, agencies who may take a different view than the FBI, correct?

A. Yes, sir, in each direction.

(R. 2520-2521)(emphasis added).

**ARGUMENT ON APPELLATE COUNSEL'S DEFICIENCY**

### Preservation of Issue for Appeal

Appellate counsel has the obligation to raise any and all meritorious issues which have been preserved for appeal, as well as those issues which constitute fundamental error, whether preserved or not. Appellate counsel was ineffective for failure to raise the issue before this Court that the Trial Court erred in failing to conduct a hearing under Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

The record is replete with instances where trial counsel preserved for review the FBI's methods of DNA testing and probability methods, which were not accepted in the general scientific community. Although undersigned counsel concedes that he could find nowhere within the record where trial counsel specifically used the word "Frye" hearing, case law establishes other means by which the issue may be preserved. Steinhorst v. State, 412 So.2d 332 (Fla. 1982)(In order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below); McDonald v. State, 743 So.2d 501 (Fla. 1999) (citing Steinhorst for the method to preserve an issue on appeal.) Trial counsel specifically informed Judge Downey at the February 25, 1992, of his intention to file a Motion to Suppress and the reasons for the motion; trial counsel filed a Motion in Limine

at the beginning of the trial informing the court of his objection to the introduction of testimony regarding DNA evidence. Trial counsel has complied with notice to the state and the court regarding his objections on the issue.

During the hearing conducted on February 25, 1992, before Judge Downey, trial counsel specifically argued to the court the need for discovery in order to attack the scientific methods applied by the FBI in conducting their probability methods.

The basis of the opposition so to speak, the basis of the testimony by those experts who frankly have very distinguished educational pedigrees concerns the method by which the FBI performs not an analysis but takes the analysis and moves into the statistical probability aspect of their DNA work.

These experts have in fact indicated that it is faulty. Not reliable. That the numbers generated by the FBI, because of the lack of appropriate data in the databases, are extremely misleading.

I provided the State about two weeks ago a copy of a motion to suppress that was in fact -- that has in fact been prepared in this case. That is in line with those cases in other jurisdiction where these experts have testified.

(R. 2468).

On the day the trial was to begin, Judge Schaeffer, after replacing Judge Downey, announced that Judge Downey's prior rulings would be the law of the case. Trial counsel filed a

motion in limine, which specifically requested that the DNA testimony and evidence not be admitted because it was not generally accepted in the scientific community:

3. The DNA analysis performed by the FBI, although purporting to be generally acceptable within the scientific community, is still insufficient and inadequate and not as yet acceptable within the scientific community as a basis for use as forensic evidence in a criminal prosecution. The FBI DNA procedures lack sufficient safeguards, quality control, and procedural regularity to allow the admission of any test results. Additionally, the FBI purports to provide statistical probabilities in relation to the testing procedures done. The databases which comprise the FBI's statistical database are insufficient to allow for such statistical probability. The lack of sufficient subgroupings, for instance, in black male populations is a serious deficiency which destroys the reliability of any statistical probability conclusions as brought by the FBI. Similar to the actual testing itself, statistical probability analysis performed by the FBI is subject to substantial criticism within the scientific community and can not be said to be substantially acceptable within the scientific community, nor, given the database deficiencies can it be found to be relevant.

(R. 1282).

In arguing to the court the motion in limine, trial counsel informed the court that he had filed, attached to a motion to compel, the publication on DNA Technology in Forensic Science from the National Research Counsel, dated April 16, 1992, which

contested the testimony of Mr. Adams.<sup>2</sup> Trial counsel did everything he could to announce his objections to Judge Downey and then to Judge Schaeffer regarding the admission of the DNA testimony and evidence. The trial court was on notice, as well as the state. There can be no question that the issue was preserved for appeal.

Unfortunately, the trial court incorrectly believed two false premises: (1) that DNA is generally admissible in Florida (R. 2015) and (2) that the testimony of expert goes to weight and not admissibility (R. 2015).

General Admissibility of DNA in Florida at Time of Trial

As to the trial court's first mis-perception of the generally admissibility of DNA in Florida, the following is offered in rebuttal. This Court entered its opinion in Mr. Washington's case on December 8, 1994, and denied a Motion for Rehearing on April 27, 1995. See Washington v. State, 653 So.2d 362 (Fla. 1995). Hayes v. State, 660 So.2d 257 (Fla. 1995) was decided June 22, 1995. In that case this Court stated: "In this opinion, this Court addresses for the first time how deoxyribonucleic acid (DNA) test results may be admitted in the trial courts of this State." Id. at 259. That statement should

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<sup>2</sup>That publication is located in the record at pages 1222 through 1255.

have been made in Mr. Washington's case. However, Appellate counsel failed to bring this issue before this Court.

In Hayes this Court stated the four-step inquiry necessary for the admission into evidence of expert testimony of a new scientific principle:

The trial judge must determine whether: (1) expert testimony will assist the jury in understanding the evidence or in determining a fact in issue; (2) the expert's testimony is based on a scientific principle or discovery that is "sufficiently established to have gained general acceptance in the particular field in which it belongs" under the *Frye* test; and (3) the particular expert witness is qualified to present opinion evidence on the subject in issue. If the answer to the first three questions is in the affirmative, the trial judge may proceed to step four and allow the expert to present an opinion to the jury.

Id. at 262.

Mr. Washington's trial court, however, did not make a determination in accordance with the second step, although the court was apprized that the issue had been raised by trial counsel. Further, this Court's opinion in Hayes included a substantial amount of the report published by the National Research Council on April 16, 1992, and acknowledged that that agency is a major voice in the scientific community. Id. at 264. While this court in Hayes specifically did not fault the trial judge because it did not possess the report, Mr. Washington's

trial court not only possessed the National Research Counsel's report (R. 1222-1255), the trial court possessed the FBI's protocol as well (R. 1201-1221).

Further, Petitioner's trial counsel attacked the state's expert's database and method of determination of probability statistics. On June 1, 1994, the First District Court of Appeals issued an opinion in Vargas v. State, 640 So.2d 1139 (Fla. 1<sup>st</sup> DAC 1994), wherein it held:

Having reviewed the expert testimony in the instant case, as well as scientific and legal writings, and judicial opinions from other jurisdictions, we conclude appellant has demonstrated that the method by which FDLE arrived at population frequencies of one in 30 million and one in 60 million, using the FBI data bases, is not generally accepted in the relevant scientific community. Therefore, those population frequencies are not admissible<sup>3</sup>.

Id. at 1150.

Unlike the trial court in Mr. Washington's case, the trial court in Vargas conducted a *Frye* inquiry upon a Motion in Limine filed by Vargas' counsel attacking the validity of the scientific method followed by FDLE in computing population

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<sup>3</sup>Counsel acknowledges that the court in Brim v. State, 654 So.2d 184 (Fla. 2<sup>nd</sup> DCA 1995) held differently than the court in Vargas. However, this Court in Brim v. State, 695 So.2d 268 (Fla. 1997) rejected the Second District's ruling that DNA population frequency statistics need not satisfy a *Frye* test.

statistics utilizing the FBI database. Id. at 1145.

Expert's testimony: Weight or Admissibility?

As to the trial court's second misperception of the law that an expert's testimony goes to the weight rather than admissibility, the Petitioner offers the following in rebuttal.

In Ramirez v. State, 651 So.2d 1164 (Fla. 1995), this Court held:

The admission into evidence of expert opinion testimony concerning a new or novel scientific principle is a four-step process. First, the trial judge must determine whether such expert testimony will assist the jury in understanding the evidence or in determining a fact in issue. Second, the trial judge must decide whether the expert's testimony is based on a scientific principle or discovery that is "sufficiently established to have gained general acceptance in the particular field in which it belongs." ...The third step in the process is for the trial judge to determine whether a particular witness is qualified as an expert to present opinion testimony of the subject in issue. All three of these steps are the decision to be made by the trial judge alone.

Id. at 1167. (Citations omitted).

Although the citations were omitted from the quotation for clarity, this Court cited to many substantial previous authorities for the proposition that an expert's testimony goes to admissibility rather than weight when such testimony embarks upon new science.

Also, in Ramirez this Court held the following:

In utilizing the *Frye* test, the burden is on the proponent of the evidence to prove the general acceptance of both the underlying scientific principle and the testing procedures used to apply that principle to the facts of the case at hand. The trial judge has the sole responsibility to determine this question. The general acceptance under the *Frye* test must be established by a preponderance of the evidence.

Id. at 1169.

Inasmuch as the record is replete with trial counsel's attempts to have a trial judge conduct a Frye hearing on the issue of DNA and the probability statistics presented by the state and the substantial case law in support of the Petitioner's argument for the court to conduct a Frye hearing, Appellate Counsel was deficient in failing to raise this issue before this Court.

#### **ARGUMENT OF PREJUDICE**

There are primarily three issues to the prejudice prong of Strickland that would have caused a different result on appeal had Appellate Counsel raised the DNA issue. The summary of these three issues, as follows, will be discussed in detail in subsequent paragraphs: (1) DNA carries a large impact upon a jury. Had the DNA not been permitted to be presented to the jury, there is a strong probability that the verdict would have

been different, (2) the issue raised on appeal by Appellate Counsel regarding the "sufficiency of the evidence" was diminished because this Court considered the DNA, as well as other evidence, as sufficient to go to the jury, and (3) the issue raised on appeal by Appellate Counsel regarding the violation of Mr. Washington's right of confrontation for failure to have access to records and the technician who performed the DNA was again diminished because this Court found that the testimony by her supervisor (Mr. Adams) was sufficient.

However, had Appellate Counsel raised the issue of DNA on appeal a different result would have occurred because this Court would have considered the concerns and problems regarding the new science of DNA in Florida, as it did in Hayes, and would have required that all documents, procedures, and personnel involved in the processing of DNA be submitted to trial counsel in order to have proper adversarial testing of DNA prior to admission at trial.

#### (1) Impact of Admission of DNA Evidence

As stated above, trial counsel adamantly brought his objections to the introduction of DNA evidence to the trial court's attention, but was left on deaf ears. Yet, Appellate Counsel failed to raise this matter before this Court.

In Thorp v. State, 777 So.2d 385 (Fla. 2001) this Court

vacated the defendant's judgment and sentence and remanded for a new trial upon circumstances similar to that of Mr. Washington:

The only other significant evidence of guilt included Thorp's statements to a fellow inmate and a witness's testimony that Thorp had blood on his clothes on the night of the murder. Based on the conclusive nature of the DNA evidence, however, and because it is the only physical evidence placing Thorp at the scene of the crime, we cannot say beyond a reasonable doubt that the improperly admitted DNA evidence had no effect on the verdict in this case.

Id. at 394.

In Petitioner's case, the jury heard the following: (a) hairs were found on the victim; which were testified to as being consistent with Mr. Washington; although admittedly not conclusive for positive identification; (b) two witnesses gave equivocal identification testimony that the individual in the courtroom (Mr. Washington) was the person who looked like the person who attempted to sell jewelry to one individual and sold a broken watch to the other individual. The watch was identified as belonging to the victim by the victim's son, and (c) that upon Mr. Washington's return to jail from work release he was immediately placed in handcuffs and he stated words to the effect of "am I being charged with murder."

Mr. Adams testified that the probability of another black

individual having the same three probes as that of Mr. Washington would be 1 in 195,000 or 1 in 400,000 other black individuals, depending upon what database was utilized (R. 2509). Certainly this testimony had a great impact upon the jury. Therefore, it must be concluded that but for the admission of DNA testimony, one could not say beyond a reasonable doubt that the verdict would not have been different.

(2) Argument of "Insufficiency of Evidence" was Diminished

In denying Petitioner's argument that the evidence was insufficient to be submitted to the jury, this Court in Washington v. State, 653 So.2d 362 (Fla. 1995) stated:

The evidence against Washington included DNA test results that matched his semen with those found at the murder scene; microscopic tests that matched his hair characteristics with hairs found at the murder scene; his possessing and selling the victim's watch;; and his proximity to the victim's home. Based on this evidence, the jury had sufficient basis to exclude all reasonable hypotheses of Washington's innocence.

Id. at 366.

Obviously the impact of the DNA testimony had an equally heavy voice to this Court as it most probably would have had to the jury, because this Court listed the DNA evidence first. That impact may also explain why this Court in expressing the evidence against Mr. Washington may have overlooked other relevant facts: (a) hair - the fact that the expert who examined

the hair unequivocally expressed that hair evidence is not a positive identification, (b) watch - that the witnesses who testified regarding the watch only stated that Mr. Washington LOOKED like the person who sold the watch, and (c) proximity - that Dr. Wood testified that the cause of death could have been as late at 10:00 am., at time when Mr. Washington was incarcerated (emphasis added).

The undersigned contends that without the DNA evidence, the circumstantial evidence was insufficient to be submitted to a jury, and this Court's overall perspective regarding the evidence submitted against Mr. Washington would have been examined within a totally different atmosphere and most certainly would have been viewed under a different microscope by this Court.

### (3) Violation of Confrontation Issue

In the original opinion of this case, this Court stated:

The DNA test results were presented through the testimony of FBI Special Agent Dwight Adams, Baumstark's supervisor. Adams testified as to the scientific reliability of the tests, interpreted the DNA test results, worked as a team with Baumstark, and supervised her as she conducted the actual test. Adams' familiarity with the test, his supervision over Baumstark's work and Baumstark's affidavit laid a proper predicate for admission of the DNA test results.

Washington, 653 So.2d at 365.

In Hayes, which was decided by this Court shortly after the Petitioner's direct appeal opinion, this Court acknowledged that the issue of DNA was of first impression for the Court. Id. at 259. Further, this Court in Hayes went to great lengths in expressing the concerns of the National Research Council of the National Academy of Sciences about how DNA testing and results should be looked at prior to the admission into evidence, and what needs to be established at a hearing before admission. This Court specifically held:

This evolving technology is constantly changing as evidenced by the fact that the National Research Council is presently revising its 1992 report. Without question, DNA testing methodology, while an extremely important new identification technique, has not yet reached the level of stability of other forms of identification such as fingerprint comparisons. In the retrial of this defendant, the DNA evidence pertaining to the vaginal swab may be presented if the State can establish that the methodology utilized by the technician in performing the tests meet the requirements of the Frye test.

In summary, we find that the DNA evidence would assist the jury in this case in determining a fact in issue. We take judicial notice that DNA test results are generally accepted as reliable in the scientific community, provided that the laboratory has followed accepted testing procedures that meet the Frye test to protect against false readings and contamination.

Id. at 265. (emphasis added).

There appears to be no question that had Appellate Counsel raised the issue of DNA before this Court, as argued above, this Court would have taken a different view of the confrontation violation than it did. It seems only logical that had Appellate Counsel raised the issue of DNA, this Court would have taken the same view as established in Hayes, thus requiring that the technician be required to testify as to the procedures utilized, and that the documents requested by trial counsel be provided, in order to determine if the procedures utilized by the FBI "meet the *Frye* test to protect against false readings and contamination." Hayes, 660 So.2d at 265.

Although each issue raised on appeal by Appellate Counsel was reviewed by this Court individually, the totality of the entire appellate process was either affected or infected by Appellate Counsel's failure to raise the issue of the admission of DNA evidence and testimony. DNA evidence permeated all aspects of the trial as well as the issues on appeal. This evidence had to have constituted the most persuasive evidence in a totally circumstantial case, and therefore Appellate Counsel's failure violated Mr. Washington's constitutional right to effective appellate counsel.

ISSUE II

MR. WASHINGTON'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 Petitioner 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 (11<sup>th</sup> Cir. June 21, 2000), the 11<sup>th</sup> Circuit Court of Appeals has stated:

Realizing that our decision in In Re: Medina, 109 F.3d 1556 (11<sup>th</sup> 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 (11<sup>th</sup> 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

Given that 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, the filing of this petition.

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

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing **PETITION FOR WRIT OF HABEAS CORPUS** has been sent to all counsel of record on this 23<sup>rd</sup> day of April, 2001.

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