

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-1122

LANCELOT URILEY ARMSTRONG,

Appellant,

v.

MICHAEL W. MOORE,

Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

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. Armstrong was deprived of the effective assistance of counsel on direct appeal and that the proceedings that resulted in his conviction and death sentence violated fundamental constitutional guarantees.

Significant errors which occurred at Mr. Armstrong's capital sentencing and trial were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel.

Citations to the Record on Direct Appeal shall be as (R. page number). All other citations shall be self explanatory

JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Fla. R. App. P. 9.100. This Court has original jurisdiction under Fla. R. App. P. 9.130

(a)(3) and Article V, § 3(b)(9), Fla. Const. The Constitution of the State of Florida guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, § 13, Fla. Const.

Its constitutional guarantee imbues habeas corpus with special status, which this Court has long recognized:

The writ of habeas corpus is a high prerogative writ of ancient origin designed to obtain immediate relief from unlawful imprisonment without sufficient legal reason...The writ is venerated by all free and liberty loving people and recognized as a fundamental guaranty and protection of their right of liberty.

Allison v. Baker, 11 So. 2d 578, 579 (1943). In fact, habeas corpus is a centuries-old right, deserving of more protection than even a constitutional right. A lower court has written:

The great writ has its origins in antiquity and its parameters have been shaped by suffering and deprivation. It is more than a privilege with which free men are endowed by constitutional mandate; it is a writ of ancient right.

Jamason v. State, 447 So. 2d 892, 894 (Fla. 4th DCA 1983), approved, 455 So. 2d 380 (Fla. 1984), cert. denied, 469

U.S. 1100 (1985). Regarding the application of procedural rules to petitions seeking the writ, this Court has explained:

[H]istorically, habeas corpus is a high prerogative writ. It is as old as the common law itself and is an integral part of our own democratic process. The procedure for the granting of this particular writ **is not to be circumscribed by hard and fast rules or technicalities which often accompany our consideration of other processes.** If it appears to a court of competent jurisdiction that a man is being illegally restrained of his liberty, it is the responsibility of the court to brush aside formal technicalities and issue such appropriate orders as will do justice. **In habeas corpus the niceties of the procedure are not anywhere near as important as the determination of the ultimate question as to the legality of the restraint.**

Anclin v. State, 88 So. 2d 918, 919-20 (Fla. 1956)(emphasis added). Most recently, this Court has written:

The fundamental guarantees enumerated in Florida's Declaration of Rights should be available to all through simple and direct means, without needless complication or impediment, and should be fairly administered in favor of

justice and not bound by technicality.

Haag v. State, 591 So. 2d 614, 616 (Fla. 1992).

REQUEST FOR ORAL ARGUMENT

Mr. Armstrong requests oral argument on this petition.

PROCEDURAL HISTORY

On March 7, 1990, an indictment was handed down charging Mr. Armstrong with one count of first degree murder, one count of attempted first degree murder and one count of robbery (R. 2061). Mr. Armstrong's jury trial commenced on April 1, 1991 and concluded on June 20, 1991 (R. 490, 2059). The jury found Mr. Armstrong guilty on all counts and as to count one, recommended that he be sentenced to death (R. 1777, 1954). Giving the jury's recommendation great weight, the court followed the recommendation and sentenced Mr. Armstrong to death on count one (R. 2420). The court also sentenced Mr. Armstrong to life imprisonment on counts two and three (R. 2423, 2426).

Mr. Armstrong unsuccessfully appealed his convictions and sentences. Armstrong v. State, 642 So.2d 730 (Fla.

1994). Mr. Armstrong filed a Petition for Writ of Certiorari with the United States Supreme Court, which was denied on April 24, 1995. Armstrong v. Florida, 115 S.Ct. 1799 (1995).

Mr. Armstrong filed a motion to vacate on March 19, 1997 (PC-R. 89-296). Following public records litigation, he filed an amended motion on April 24, 2000 (PC-R. 297-428). Following a Huff hearing, the lower court entered an order granting a limited evidentiary hearing on Mr. Armstrong's claims of ineffective assistance of trial counsel at the penalty phase and on his claim pursuant to Johnson v. Mississippi 108 S. Ct. 1981 (1988), but summarily denied all his other claims (PC-R. 6432-658). Following an evidentiary hearing held before the lower court on March 21, 22, and 23, the lower court entered an order denying post conviction relief (PC-R-777-805). Mr. Armstrong then filed a motion for rehearing (PCR.806-815), which was denied on July 24, 2001 (PCR. 824). The initial brief appealing this denial is filed with this Court simultaneously with the instant

petition.

GROUND FOR HABEAS CORPUS RELIEF

CLAIM I

**APPELLATE COUNSEL FAILED TO RAISE ON
APPEAL NUMEROUS MERITORIOUS ISSUES
WHICH WARRANT REVERSAL OF THE
CONVICTION AND/OR THE DEATH SENTENCE**

A. INTRODUCTION

Mr. Armstrong had the constitutional right to the effective assistance of counsel for purposes of presenting his direct appeal to this Court. Strickland v. Washington, 466 U.S. 668 (1984). "A first appeal as of right [] is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." Evitts v. Lucey, 469 U.S. 387, 396 (1985). The Strickland test applies equally to ineffectiveness allegations of trial counsel and appellate counsel. See Orazio v. Dugger, 876 F. 2d 1508 (11th Cir. 1989). Further, this Court has held that "[h]abeas petitions are the proper vehicle to

advance claims of ineffective assistance of appellate counsel." Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000).

Because the constitutional violations which occurred during Mr. Armstrong's trial were "obvious on the record" and "leaped out upon even a casual reading of transcript," it cannot be said that the "adversarial testing process worked in [Mr. Armstrong's] direct appeal." Matire v. Wainwright, 811 F. 2d 1430, 1438 (11th Cir. 1987). The lack of appellate advocacy on Mr. Armstrong's behalf is identical to the lack of advocacy present in other cases in which this Court has granted habeas corpus relief. Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985). Appellate counsel's failure to present the meritorious issues discussed in this petition demonstrates that his representation of Mr. Armstrong's involved "serious and substantial deficiencies." Fitzpatrick v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986). 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). In light of the serious reversible error that appellate counsel never raised, there is more than a reasonable probability that the outcome of the appeal would have been different, and a new direct appeal must be ordered.

This Court articulated the standard for evaluation of appellate ineffective assistance of counsel:

With regard to evidentiary objections which trial counsel made during the trial and which appellate counsel did not raise on direct appeal, this court evaluates the prejudice or second prong of the Strickland test first. In doing so, we begin our review of the prejudice prong by examining the specific objection made by trial counsel for harmful error. A successful petition must demonstrate that the erroneous ruling prejudiced the petitioner. If we conclude that the trial court's ruling was not erroneous, then it naturally follows that habeas petitioner was not prejudiced on account of appellate counsel's failure to raise that issue. If we do conclude that the trial

court's evidentiary ruling was erroneous, we then consider whether such error is harmful error. If that error was harmless, the petitioner likewise would not have been prejudiced.

Jones v. Moore, 794 So. 2d 579 (Fla. 2001).

Mr. Armstrong need not establish his claim by a preponderance of the evidence; rather the standard is less than a preponderance. Williams v. Taylor, 120 S.Ct. 1495, 1519 (2000)("[i]f a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be `diametrically different,' `opposite in character or nature,' and `mutually opposed' to our clearly established precedent ...")

B. FAILURE TO RAISE THE DENIAL OF MR. ARMSTRONG'S MOTION FOR CHANGE OF VENUE

Pretrial publicity prejudiced Mr. Armstrong's jury,

rendering the outcome of his capital trial unreliable. However, appellate counsel, without strategy or tactic, did not raise this issue on direct appeal, to Mr. Armstrong's substantial prejudice. Prejudicial publicity pervaded the community immediately after the incident up until the time of trial. A number of jurors had heard about the case. The media coverage relating to this case was ubiquitous and highly prejudicial. Jurors recalled that Mr. Armstrong's name and face were on television (e.g., R. 624).

Furthermore, the State Attorney fuelled the prejudice by releasing discovery materials in its possession to the Miami Herald over the objection of defense counsel (R. 28). The court had the discretion to deny access to the records. Although the court was aware that in high publicity cases, disclosure could taint a jury panel, the information was released. The court even acknowledged that despite the size of Broward County, releasing discovery information in the future would require a change of venue. In granting the public

records request, the court stated, "I guarantee I will get an impartial jury" (R. 28). The information was released prior to voir dire. The court subsequently denied counsel's Motion for Change of Venue, and the venire included people who had read about the incident (e.g., R. 400, 430). The media coverage relating to this case was pervasive and highly prejudicial. Mr. Armstrong's name and face were on television (R. 624). In fact, the State's theory of the case was published prior to the trial in the Sun-Sentinel on Sunday, February 18, 1990 and on Monday, April 30, 1990. Another article, discussing Robert Sallustio's trauma following the incident, including his respect for Deputy Greeney, was published in the Tuesday, May 22, 1990 Miami Herald.

The facts discussed above demonstrate that Mr. Armstrong was denied his right to a fair and impartial jury and to a jury selected according to the requirements of due process and equal protection. In Irvin v. Dowd, 366 U.S. 717 (1961), the Supreme Court

explained:

In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. The failure to accord an accused a fair hearing violates even the minimum standards of due process [citations]. "A fair trial in fair tribunal is a basic requirement of due process."

Irvin, 366 U.S. at 721. It simply cannot be said that Mr. Armstrong's trial comported with the mandate or spirit of the constitutional guarantee of a "fair tribunal." To assert that Mr. Armstrong's jury was "impartial" is to render due process "but a hollow formality." Rideau v. Louisiana, 373 U.S. 723, 726 (1963).

The constitutional standards governing change of venue issues were summarized in Coleman v. Kemp, 778 F.2d 1487 (11th Cir. 1985):

Ultimately, those standards derive from the Fourteenth Amendment's due process clause, which safeguards a defendant's Sixth Amendment right to be tried by "a panel of impartial, `indifferent jurors.'" Irvin v. Dowd, 366 U.S. 717, 722, 81 S. Ct. 1639, 1642, 6 L.Ed.2d

751 (1961). The trial court may be unable to seat an impartial jury because of prejudicial pretrial publicity or an inflamed community atmosphere. In such a case, due process requires the trial court to grant defendant's motion for a change of venue, Rideau v. Louisiana, 373 U.S. 723, 726, 83 S. Ct. 1417, 1419, 10 L.Ed.2d 663 (1963), or a continuance, Sheppard v. Maxwell, 384 U.S. 333, 362-63, 86 S. Ct. 1507, 16 L.Ed.2d 600 (1966). At issue is the fundamental fairness of the defendant's trial, Murphy v. Florida, 421 U.S. 794, 799, 95 S. Ct. 2031, 2035, 44 L.Ed.2d 589 (1975). There are two standards which guide analysis of this question, the "actual prejudice" standard and the "presumed prejudice" standard.

Coleman, 778 F.2d at 1489 (emphasis added).

In Mr. Armstrong's case, the jurors' knowledge of the case and the inflamed community atmosphere deprived Mr. Armstrong of a fair trial under both an inherent prejudice and an actual prejudice analysis. See, Heath v. Jones, 941 F.2d 1126, 1134 (11th Cir. 1991).

Inherent prejudice occurs when pretrial publicity "is sufficiently prejudicial and inflammatory and the prejudicial pretrial publicity saturated the community

where the trials were held." Coleman, 778 F.2d at 1490. Actual prejudice occurs when "the prejudice actually enters the jury box and affects the jurors." Heath, 941 F.2d at 1134. In determining whether a jury was fair and impartial, the reviewing court "must examine the totality of the circumstances surrounding the petitioner's trial." Coleman, 778 F.2d at 1538. "[N]o single fact is dispositive." Id.

An inherent prejudice analysis requires examining whether pretrial publicity was inflammatory and whether that publicity saturated the community. Heath, 941 F.2d at 1134. The facts discussed above demonstrate that Mr. Armstrong has met both of those requirements. The inflammatory nature of the pretrial publicity which saturated the community up to and including the time of Mr. Armstrong's trial clearly narrated a change of venue. Presumed prejudice has been established. Here, as in Coleman, 778 F.2d at 1538.

The prejudice pervading the community "enter[ed] the jury box," Heath, 941 F.2d at 1134, and created actual

prejudice. In this context, jurors' statements that they would set aside pretrial knowledge of the case and their feelings about the victims or their family were not dispositive, particularly where the final jurors were exposed to the highly inflammatory opinions of other prospective jurors during voir dire and no one knew the extent of their knowledge of the case. As the Supreme Court explained in Irvin v. Dowd:

No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight. As one of the jurors put it, "You can't forget what you hear and see." With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion....

Irvin, 366 U.S. at 728. See also, Sheppard v. Maxwell, 384 U.S. 333, 351 (1966) (jurors' statements that they would decide the case only on evidence and that they felt no prejudice toward Mr. Armstrong not dispositive

of claim that pretrial publicity deprived Mr. Armstrong of fair trial). In a related context, the Supreme Court has observed:

The actual impact of a particular practice on the judgment of jurors cannot always be fully determined. But this Court has left no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny. Estes v. Texas, 385 U.S. 532, 85 S. Ct. 1628, 14 L.Ed.2d 543 (1965); In re Murchison, 349 U.S. 133, 75 S. Ct. 623, 99 L.Ed. 942 (1955). Courts must do the best they can to evaluate the likely effects of a particular procedure, based on reason principle, and common human experience.

Estelle v. Williams, 425 U.S. 501, 504 (1976). See also, Holbrook v. Flynn, 475 U.S. 560, 570 (1986).

Mr. Armstrong's trial was infected from the very beginning. He was convicted and sentenced to death in a proceeding so fundamentally and irreparably tainted by the all-pervasive pretrial media coverage and an overwhelming presence of uniformed police officers in the courtroom during trial, as to deny him the fair trial and sentencing proceeding guaranteed by the Sixth,

Eighth, and Fourteenth Amendments. His conviction and sentence must therefore fail. An evidentiary hearing and Rule 3.850 relief are warranted.

**C. FAILURE TO RAISE IMPROPER
QUALIFICATION OF STATE WITNESSES AS
EXPERTS**

The trial court permitted State witnesses to testify to matters requiring that they be experts, but failed to require the State to establish their expertise. This improperly bolstered the witnesses' credibility with the jury, to Mr. Armstrong's substantial prejudice.

Over counsel's objection, the trial court permitted State witnesses to testify as experts when they were not qualified to do so (R. 1288). George Duncan was qualified as an expert in the field of DNA (R. 1228). Although he testified that he was not a population geneticist, (R. 1208), he testified about the probabilities that the matches he found would occur in the population (R. 1256, 57). There was no showing that he had specific knowledge about population

frequency calculations. Therefore, his testimony in this area was inadmissible. See, Hall v. State, 568 So. 2d 882 (Fla. 1990); Gillam v. State, 514 So. 2d 1098 (Fla. 1987). Furthermore, in explaining his qualifications to perform DNA testing, Mr. Duncan had discussed his experience in conventional serology (R. 1207, 1212). Conventional serology is wholly unrelated to DNA testing. The techniques are different and they require different skills. It was error for the court to consider Mr. Duncan's conventional serological experience in qualifying him as an expert.

Similarly, trial counsel objected to the qualification of State witness Charles Edel as a firearms operations expert so he could testify about what he called "searing" on Officer Greeney's shirt (R. 975). On voir dire, Edel made it plain that while he may have understood the mechanics of how a weapon works, he was not qualified to testify as to marks and "searing" that result from gunshots:

[Mr. Malavenda] You have never been

to any schooling regarding searing,
have you?

[Mr. Edel] In regard to searing? no,
I don't believe there is one.

[q/] You have never been qualified
as an expert in the field of searing?

[A.] No sir.

(R. 975)

An insufficient basis was established to connect
firearms expertise to "searing." Consequently, this
testimony also was unreliable.

The court also erred in permitting Dr. Martin Tracey
to testify that the results George Duncan obtained in
his DNA testing were accurate (R. 1191-94). Dr.
Tracey's conclusions regarding Mr. Duncan's work were
not reliable. Although he testified that production of
the autoradiograms is the critical result in the
reliability of DNA analysis, he did not assist Mr.
Duncan in producing the autoradiograms (R. 1166).
Therefore, he could not have detected mistakes occurring
in the process of extracting the DNA, cutting the DNA,
ordering the strands according to weight or sending

probes to see if matches would occur. Nor could he have detected contamination if it had occurred. He did not review the protocol Mr. Duncan used in this case, and so could not have known whether Mr. Duncan missed a subprocedure within these larger steps. Nor could he have known whether conditions occurred which contaminated the DNA or any of tools, biological or otherwise. Furthermore, Dr. Tracey testified that he verified Mr. Duncan's finding of a match by doing a visual comparison. He admitted, however, that his copies were not very good (R. 1189). Dr. Tracey did not do a computer match because he was not a forensic DNA analyst and did not regularly perform computer analysis of alleles. Trial counsel objected to Dr. Tracey 's testimony being utilized to make up for Duncan's lack of expertise in the area, but was overruled (R. 1170). The net effect was to improperly bolster the State's case, to Mr. Armstrong's substantial prejudice.

D. FAILURE TO RAISE THE ISSUE OF

**GRUESOME, INFLAMMATORY AND CUMULATIVE
PHOTOGRAPHS**

At Mr. Armstrong's capital trial, over objection, the prosecution was permitted to introduce into evidence gruesome photographs that were inflammatory, cumulative, and prejudicial, and admitted solely to inflame the passion of the jurors based on impermissible factors. The admission of these photographs allowed the State free rein in inflaming the passions of the jury. The probative value of these photographs was not outweighed by their prejudice. The prejudicial effect of the photographs undermined the reliability of Mr. Armstrong's conviction and death sentence. The photographs themselves did not independently establish any material part of the state's case nor were they necessary to corroborate a disputed fact. The trial court's error in admitting these photographs cannot be considered harmless beyond a reasonable doubt. Chapman v. California, 87 S. Ct. 824 (1967); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

The admission of these photographs provides further demonstration of the trial court's bias towards the State in this high profile death penalty case. State's exhibits T, Q, and S all showed gory closeups of the wounds on the victim's body. The State purportedly offered these photographs to show that Officer Greeney was "a law enforcement officer" (R. 828), and trial counsel noted that there would be other, less inflammatory photographs that would establish that fact (R. 829).

Use of these gruesome, misleading and irrelevant photographs, which were cumulative, inflammatory, and appealed improperly to the jury's emotions, denied Mr. Armstrong a fair trial in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and to corollary provisions within the Florida Constitution. However, appellate counsel inexplicably failed to raise the issue despite trial counsel's properly preserved objections. Relief is warranted.

E. FAILURE TO ENSURE A COMPLETE RECORD

Appellate counsel for Mr. Armstrong failed to ensure that a complete record of the lower court proceedings was compiled.

Critical depositions and proceedings from the record on appeal were omitted from Mr. Armstrong's record.

Several of these omissions were material to Mr.

Armstrong's direct appeal. The first strike conference

during voir dire results in many more people being

stricken than are actually mentioned in the recorded

portion of the conference (R. 327). Not one of the

subsequent strike conferences were reported (R. 381,

407, 437, 453, 468). Answers to voir dire questions

posed by counsel for the State and the defense went

unrecorded or inaccurately reported (R. 432). It

appears from the record in Mr. Armstrong's case that at

least one juror was stricken on the basis of race.

However, since the record does not reflect this

conference, appellate counsel could not raise the issue

on direct appeal, depriving Mr. Armstrong of a potentially meritorious argument.

Because fundamental error occurs when jurors are stricken on the basis of race or gender, it is particularly important that Mr. Armstrong be provided with a complete and accurate record on appeal in his case. See, Batson v. Kentucky, 476 U.S. 79 (1986). During voir dire, juror Coffie was stricken from the panel (R. 437). No reason justifying a strike for cause appears in the record. Mr. Coffie's life appeared to be similar to those selected to serve on Mr. Armstrong's jury. He was employed, and had relatives with experience in the criminal justice system (R. 416-417). One of his brothers had been arrested by Broward Sheriff's Officers, but he stated that this would not affect his decision (R. 419). He voiced no hostility toward or bias against police officers despite having had unpleasant experiences with them (R. 419-20). He stated that he believed in the death penalty in appropriate cases (R. 422), that he could be fair and

impartial and that he would not experience any hardship by serving on Mr. Armstrong's jury (R. 423). Mr. Coffie did not serve on Mr. Armstrong's jury. Jurors who did serve had experiences in life that were similar to Mr. Coffie, such as relatives having been arrested, (R. 460), and owning and knowing about guns (R. 435).

Discriminatory selection of a jury venire may be challenged under the Sixth Amendment's requirement that the venire reflect a fair cross-section of the community. Duren v. Missouri, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979). A criminal defendant has standing to present a fair cross-section challenge whether or not he or she is a member of the excluded class. Duren, 439 U.S. at 359 n. 1, 99 S.Ct. at 666 n. 1. See, Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965); Melton v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975).

Discriminatory selection of a jury venire may also be challenged under the Equal Protection Clause of the Fourteenth Amendment. Castaneda v. Partida, 430 U.S.

482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977). Absent evidence of systematic long-term under representation, a defendant may establish a prima facie case upon a showing that members of his or her race were substantially under represented from the particular venire from which the jury was drawn and that this venire was selected under a practice providing an opportunity for discrimination. Batson v. Kentucky, 476 U.S. 79, 95, 106 S.Ct. 1712, 1722, 90 L.Ed.2d 69 (1986), see, Washington v. Davis, 426 U.S. 229, 241, 96 S.Ct. 2040, 2048, 48 L.Ed.2d 597 (1976).

Appellate counsel could not render effective assistance in the absence of a complete record. It was the duty of appellate counsel to ensure that the record on appeal was complete and accurate, yet without strategy or tactic this was not done. Moreover, this Court's review could not be constitutionally complete. See Parker v. Dugger, 111 S. Ct. 731 (1991). Relief is warranted.

F. FAILURE TO RAISE A CUMULATIVE

ERROR ARGUMENT

In Jones v. State, 569 So. 2d 1234 (Fla. 1990) this Court vacated a capital sentence and remanded for a new sentencing proceeding before a jury because of "cumulative errors affecting the penalty phase." Id. at 1235 (emphasis added). In Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990) cumulative prosecutorial misconduct was the basis for a new trial. When cumulative errors exist the proper concern is whether:

even though there was competent substantial evidence to support a verdict...and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors was such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation.

Jackson v. State, 575 So. 2d 181, 189 (Fla. 1991). See also, Ellis v. State, 622 So. 2d 991 (Fla. 1993) (new trial ordered because of prejudice resulting from cumulative error); Taylor v. State, 640 So. 2d 1127 (Fla. 4th DCA 1994). The Supreme Court of the United

States has consistently emphasized the uniqueness of death as a criminal punishment. Death is "an unusually severe punishment, unusual in its pain, in its finality, and in its enormity." Furman, 408 U.S. at 287 (Brennan, J., concurring). It differs from lesser sentences "not in degree but in kind. It is unique in its total irrevocability." Id. at 306 (Stewart, J., concurring). The severity of the sentence "mandates careful scrutiny in the review of any colorable claim of error." Zant v. Stephens, 462 U.S. 862, 885 (1983). Accordingly, the cumulative effects of error must be carefully scrutinized in capital cases.

The sheer number of errors that occurred in Mr. Armstrong's trial deprived Mr. Armstrong of adversarial testing and a fair trial which would produce a reliable outcome. The outcome of Mr. Armstrong's trial is unreliable. Appellate counsel had no reasonable strategy or tactic for failing to raise these properly preserved instances of judicial error. Relief is warranted.

CLAIM II

THIS COURT'S HARMLESS ERROR ANALYSIS WAS BASED ON AN INVALID AGGRAVATING CIRCUMSTANCE

The trial court in Mr. Armstrong's case gave instructions on and found four aggravating circumstances. These were (1) committed for the purpose of avoiding arrest, (2) murder of a law enforcement officer engaged in the performance of official duties, (3) committed during a robbery or flight therefrom, and (4) prior conviction of a violent felony. See R. 2429. The State argued three violent felonies as a basis for the prior conviction of a violent felony aggravating circumstance, namely the contemporaneous attempted murder and robbery, and the prior Massachusetts conviction for indecent assault and battery.

On direct appeal, Mr. Armstrong argued that the lower court's finding of these four aggravating circumstances was error because it was based on two instances of improper doubling. Mr. Armstrong argued

that the committed for the purpose of avoiding arrest and the murder of a law enforcement officer engaged in the performance of official duties aggravating circumstances were duplicative, since they were based on the same aspect of the crime. In addition, he argued that the committed during a robbery or flight therefrom, was based on the same facts as the prior conviction of a violent felony, namely the contemporaneous convictions for attempted murder and robbery.

In its opinion denying Mr. Armstrong's direct appeal, this Court acknowledged that the committed for the purpose of avoiding arrest and the murder of a law enforcement officer engaged in the performance of official duties aggravating circumstances were duplicative, and therefore improperly doubled. However, this Court then found:

Armstrong's argument, however that the "committed while engaged in the commission of a robbery or flight therefrom" and "prior conviction of a violent felony" aggravators are also duplicative is without merit because the record reflects that Armstrong had

a previous felony conviction for indecent battery on a fourteen year old child.

Armstrong v. State, 642 So. 2d 730, 738, (Fla. 1994).

Thus, in the Court's analysis, the prior violent felony aggravating circumstance was still valid, even though the contemporaneous attempted murder and robbery convictions were duplicative of the commission while engaged in the commission of a robbery or flight therefrom circumstance. The Court was thus able to find that although the trial court had improperly doubled the committed for the purpose of avoiding arrest and the murder of a law enforcement officer engaged in the performance of official duties aggravating circumstances, this was:

harmless error beyond a reasonable doubt in the light of the remaining three valid aggravating circumstances and the negligible mitigating evidence in this case.

Id. at 739 (emphasis added).

This Court's analysis, however, was predicated on an

invalid aggravating circumstance. The sole basis for this Court upholding the prior violent felony aggravating circumstance was the prior Massachusetts conviction. This conviction was in fact invalid. See Initial Brief at 7.

This Court's finding that there were three valid aggravating circumstances is incorrect. This Court's harmless error analysis was Eighth and Fourteenth Amendment error. The harmless error test was set forth by the United States Supreme Court in Chapman v. California, 386 U.S. 18 (1967). For a constitutional error to be harmless, the State must show "beyond a reasonable doubt that the error complained of did not contribute to the [outcome] obtained." Yates v. Evatt, 111 S. Ct. 1884 (1991), citing Chapman v. California. The burden is on the State to show the harmlessness of the error and to overcome a presumption of harm. Arizona v. Fulminante, 111 S. Ct. 1246 (1991). If there is a reasonable possibility that the constitutional error might have contributed to the jury's

recommendation, the error is not harmless beyond a reasonable doubt and Mr. Armstrong is entitled to relief. Chapman v. California; Yates v. Evatt.

Florida adopted the Chapman test in State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), which held that the State as beneficiary of the error must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict, or alternatively stated, that there is no reasonable possibility that the error contributed to the conviction or sentence.

The judge and jury that sentenced Mr. Armstrong were presented with and considered two improperly double aggravating circumstances. This starkly violated the Eighth and Fourteenth Amendments to the United States Constitution, and prevented the constitutionally required narrowing of the sentencer's discretion. See Stringer v. Black, 112 S. Ct. 1130 (1992); Maynard v. Cartwright, 486 U.S. 356 1988). As a result, these impermissible aggravating factors evoked a sentence that was based on an "unguided emotional response," a clear

violation of Mr. Armstrong's constitutional rights.

Penry v. Lynaugh, 492 U.S. 302 (1989).

The penalty phase of Mr. Armstrong's trial did not comport with these essential principles. This Court's harmless error analysis on direct appeal did not comport with the requirements of Chapman, DiGuilio, and Stringer. Relief is warranted.

CLAIM III

MR. ARMSTRONG WAS DENIED A PROPER DIRECT APPEAL DUE TO OMISSIONS IN THE RECORD.

The beginning point for any meaningful appellate review process is absolute confidence in the completeness and reliability of the record. The appeal of any criminal case assumes that an accurate transcript and record will be provided counsel, appellant and the appellate court. Mayer v. Chicago, 404 U.S. 189, 1195 (1971) ("State must provide a full verbatim record where that is necessary to assure the indigent as effective an appeal as would be available to the defendant with the

resources to pay his own way"); Entsminger v. Iowa, 386 U.S. 748, 752 (1967) ("Here there is no question but that petitioner was precluded from obtaining a complete and effective appellate review of his conviction by the operation of the clerk's transcript procedure"). Eighth Amendment considerations demand even greater precautions in a capital case. See, Penry v. Lynaugh, 488 U.S. 74 (1989); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S. 280 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972).

In Dobbs v. Zant, 113 S.Ct. 835, 122 L.Ed.2d 103, (1993), the United States Supreme Court held that

the Court of Appeals erred when it refused to consider the full sentencing transcript. We have emphasized before the importance of reviewing capital sentences on a complete record. Gardner v. Florida, 430 U.S. 349, 361, 97 S.Ct. 1197, 1206, 51 L.Ed 2d 393 (1977) (plurality opinion). Cf. Gregg v. Georgia, 428 U.S. 153, 167, 198, 96 S.Ct. 2909, 2922, 2936, 49 L.Ed.2d 859 (1976) (joint opinion of Stewart,

Powell, and STEVENS, JJ.) (Georgia capital sentencing provision requiring transmittal on appeal of complete transcript and record is important "safeguard against arbitrariness and caprice"). In this case, the Court of Appeals offered no justification for its decision to exclude the transcript from consideration. There can be no doubt as to the transcript's relevance, for it calls into serious question the factual predicate on which the District Court and Court of Appeals relied in deciding petitioner's ineffective assistance claim. As the Court of Appeals itself acknowledged, its refusal to review the transcript left it unable to apply the manifest injustice exception to the law of the case doctrine, and hence unable to determine whether its prior decision should be reconsidered.

FN1. The concurrence suggests, post, at 837-838, that the error in this case, limited in scope to closing arguments at the penalty phase, is likely insignificant. In fact, an inadequate or harmful closing argument, when combined, as here, with a failure to present mitigating evidence, may be highly relevant to the ineffective assistance determination under Eleventh Circuit law. See King v. Strickland, 714 F.2d 1481, 1491 (CA11 1983), vacated on other grounds, 467 U.S. 1211, 104 S.Ct. 2651, 81 L.Ed.2d 358 (1984), adhered to on remand, 748 F.2d 1462, 1463-1464 (CA11 1984), cert.

denied, 471 U.S. 1016, 105 S.Ct. 2020,
85 L.Ed.2d 301 (1985); Mathis v. Zant,
704 F.Supp. 1062, 1064 (ND Ga.1989).

Dobbs v. Zant, 113 S.Ct. 835, 122 L.Ed.2d 103, (1993).

Full appellate review of proceedings resulting in a sentence of death is required in order to assure that the punishment accorded to the capital defendant comports with the eighth amendment. See, Proffitt v. Florida; Johnson v. State, 442 So. 2d 193 (Fla. 1983)(Shaw, J. dissenting); Ferguson v. State, 417 So. 2d 639 (Fla. 1982); Swann v. State, 322 So. 2d 485 (1975); Art. V, 3(b)(1) Fla. Const.; 921.141(4) Fla. Stat. (1985). Indeed, Florida law insists upon review by the Supreme Court "of the entire record." Fla. Stat. 921.141(4) (1985) (emphasis added). In Florida capital cases, the chief circuit judge is required "to monitor the preparation of the complete record for timely filing in the Supreme Court." Fla. R. App. P. 9.140(b)(4) (emphasis added).

Critical depositions and proceedings from the record on appeal were omitted from Mr. Armstrong's record.

Several of these omissions are material to Mr. Armstrong's claims. For example, the first strike conference during voir dire results in many more people being stricken than are actually mentioned in the recorded portion of the conference (R. 327). Not one of the subsequent strike conferences were reported (R. 381, 407, 437, 453, 468). Answers to voir dire questions posed by counsel for the State and the defense went unrecorded or inaccurately reported (R. 432). Counsel cannot accurately determine what occurred due to inaccurate incomplete court reporting of Mr. Armstrong's capital murder trial. Appellate counsel was, and post-conviction counsel is, prevented from rendering effective assistance in the in the absence of a complete record. Moreover this Court's review could not be constitutionally complete. See, Parker v. Dugger, 111 S. Ct. 731 (1991).

The trial judge was required to certify the record on appeal in capital cases. 921.141(4) Fla. Stat. (1996). This has not been done. When errors or

omissions appear, as here, re-examination of the complete record in the lower tribunal is required. Delap v. State, 350 So. 2d 462 (Fla. 1977). In addition, Mr. Armstrong's former counsel rendered ineffective assistance in failing to assure that a proper record was provided to the court. Mr. Armstrong requests a hearing on this claim. See, Fla. R. Jud. Admin. 2.050.

CLAIM IV

THE CONSTITUTIONALITY OF THE FIRST- DEGREE MURDER INDICTMENT MUST BE REVISITED IN LIGHT OF APPRENDI V. NEW JERSEY

On direct appeal, appellate counsel challenged the constitutionality of Florida's death penalty statute. See Initial Brief 82-98. Counsel challenged inter alia the felony murder aggravating circumstance (Initial Brief at 82); the fact that only a bare majority verdict is required at penalty phase (Initial Brief at 84); the

fact that Florida allows an element of the crime to be found by a majority only of the jury (Initial Brief at 85); the advisory role of the jury (Initial Brief at 85); and the lack of special verdicts (Initial Brief at 95) Mr Armstrong submits that this matter is ripe for reconsideration in light of Apprendi v. New Jersey, 120 S.Ct. 2348 (2000).

In Apprendi, 120 S. Ct. 2348 (2000), the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 2362-63.¹ The constitutional

¹Apprendi involved a trial judge's application of a New Jersey "hate crime" statute. A grand jury returned a 23-count indictment charging Apprendi with shootings on four different dates, as well as the unlawful possession of various weapons. Apprendi, 120 S.Ct. at 2352. None of the counts referred to the New Jersey hate crime statute, and none alleged that Apprendi acted with a racially biased purpose. Id. Apprendi pleaded guilty to two counts of second-degree possession of a firearm for an unlawful purpose, and one count of the third-degree offense of unlawful possession of an antipersonnel bomb. Id. Under New Jersey law, a

underpinning of the Apprendi Court's holding is the

second-degree offense carries a penalty range of 5 to 10 years; a third-degree offense carries a penalty range of between 3 and 5 years. Id. If the judge found no basis for the biased purpose enhancement, the maximum consecutive sentences on those counts would amount to 20 years in aggregate. Id. If, however, the judge enhanced the sentence based on a finding of biased purpose, the maximum on one count alone would be 20 years and the maximum for the two counts in aggregate would be 30 years, with a 15-year period of parole ineligibility. Id. After holding an evidentiary hearing on the issue of Apprendi's "purpose" for the shooting, the judge concluded that, by a preponderance of the evidence, Apprendi's actions were taken "with a purpose to intimidate" as provided by the statute. Id. Finding that the hate crime enhancement applied, the judge sentenced Apprendi to a 12-year term of imprisonment on the enhanced count, and to shorter concurrent sentences on the other two counts. Id.

Apprendi appealed, arguing, *inter alia*, that the Due Process Clause of the United States Constitution requires that the finding of bias upon which his hate crime sentence was based must be proved to a jury beyond a reasonable doubt. See In re Winship, 397 U.S. 358 (1970). Apprendi, 120 S.Ct. at 1452. Over dissent, the Appellate Division of the Superior Court of New Jersey upheld the enhanced sentence; relying on McMillan v. Pennsylvania, 477 U.S. 79 (1986), the appeals court found that the state legislature decided to make the hate crime enhancement a "sentencing factor," rather than an element of an underlying offense--and that decision was within the State's established power to define the elements of its crimes. Apprendi, 120 S.Ct. at 2353. A divided New Jersey Supreme Court affirmed. Id.

Sixth Amendment right to trial by jury, as well as the Fourteenth Amendment right to due process. Id. at 2355 ("At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without 'due process of law,' Amdt. 14, and the guarantee that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury,' Amdt. 6"). "Taken together, these rights indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'" Id. (quotation omitted).²

²Apprendi's holding was "foreshadowed" by the Supreme Court's decision in Jones v. United States, 526 U.S. 227 (1999). Apprendi, 120 S.Ct. at 2355. In Jones, the Court, addressing a Fifth and Sixth Amendment challenge to a federal carjacking statute, held: "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Jones, 526 U.S. at 243.

Since the Sixth and Fourteenth Amendments are violated under the New Jersey scheme in Apprendi, then Florida's failure to require the State to charge and prove the underlying elements of either premeditated or felony murder suffers from a similar constitutional flaw. Thus, this issue should be revisited at this time.

Similarly, pursuant to State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), the statutory aggravating circumstances enumerated in Florida Statute 921.141 have been held to define the elements of a capital crime. Thus, under the Sixth and Fourteenth Amendments, the aggravating circumstances must be alleged in the indictment. See Jones v. United States, 526 U.S. 227 (1999); Apprendi v. New Jersey, 530 U.S. 466 (2000). As in Apprendi, in Mr. Armstrong's case, the aggravating sentencing factors came into play only after he was found guilty, and increased the statutory maximum penalty, based upon the guilty verdict, from life imprisonment to death. Certainly, the difference between life and death has

more than nominal effect and is of constitutional significance.

In Florida, it is the judge and not the jury who finds the specific aggravating factors that make a person death-eligible. Fla. Stat. §921.141 (1),(2) (1981). See Walton v. Arizona, 497 U.S. 639, 648 (1990). For Sixth Amendment purposes, these aggravators are elements of a death penalty offense, as this Court determined in Dixon. Because the effect of finding an aggravator exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict, the aggravator must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt. Apprendi, 530 U.S. at 494-95. This did not occur in Mr. Armstrong's case. Moreover, the fact that Florida's death penalty statute only requires a bare majority for its sentencing recommendation contravenes the principles set forth in Apprendi.

Mr. Armstrong acknowledges that this Court has held that Apprendi has not impacted Florida's sentencing

scheme and has not overruled Walton. Mills v. Moore, 786 So. 2d 532, 537 (Fla. 2001) ("[b]ecause Apprendi did not overrule Walton, the basic scheme in Florida is not overruled either"). See also Brown v. Moore, 800 So. 2d 223 (Fla. 2001); Mann v. Moore, 794 So. 2d 595, 599 (Fla. 2001). However, on January 11, 2002, the Supreme Court granted *certiorari* review in Arizona v. Ring, 25 P.3d 1139 (Ariz. 2001), cert. granted, 122 S.Ct. 865 (2002). In Ring, the Court is going to decide whether Walton should be overruled in light of Apprendi. The Supreme Court has also granted a stay of execution to Florida death row inmates Amos King and Linroy Bottoson, who have presented to the Court the issue of Apprendi's impact on Florida. King v. State, 808 So. 2d 1237 Fla. (2002), stay granted, 122 S. Ct. 932 (U.S. 2002); Bottoson v. State, 27 Fla. L. Weekly 5119 (Jan. 31 2002), stay granted, 122 S. Ct. 981 (U.S. 2002). Thus, Mr. Armstrong presents this claim at this time for preservation purposes, and submits that relief is warranted.

CONCLUSION

For all of the reasons discussed herein, Mr. Armstrong respectfully urges the Court to grant habeas corpus relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing petition has been furnished by United States Mail, first class postage prepaid, to Celia Terenzio Esq., Office of the Attorney General, 1515 North Flagler Drive, 9th Floor, West Palm Beach, FL 33340-3432 on May 14, 2002.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that this brief complies with the font requirements of rule 9.100(1), Fla. R. App. P.

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