

IN THE SUPREME COURT OF FLORIDA

F.W. CUMMINGS-EL,

Petitioner,

vs.

FSC case no. SC02-1784

Lower case no. F91-33268

MICHAEL W. MOORE,
Secretary, Department
of Corrections,

Respondent.

_____ /

AMENDED PETITION FOR WRIT OF HABEAS CORPUS

TONY MOSS, ESQUIRE
LAW OFFICE OF TONY MOSS,
P.A.
FLA. BAR NO. 0646318
851 N.E. 118TH STREET
MIAMI, FL 33161
(305) 891-5771

SARA D. BAGGETT, ESQUIRE
FLA. BAR NO. 0857238
2311 23RD WAY
WEST PALM BEACH, FL. 33407
(561) 683-0666

ATTORNEYS FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CONTENTS	ii
TABLE OF CITATIONS	iii
PROCEDURAL HISTORY	1
GROUNDS FOR RELIEF	8
CLAIM I	8
APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE NUMEROUS INSTANCES OF PROSECUTORIAL MISCONDUCT THAT DEPRIVED PETITIONER OF A FAIR SENTENCING HEARING	
A. Improper Evidence	10
B. Improper Comments in Closing	16
CLAIM II	25
APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ENSURE PROPER PREPARATION OF THE RECORD ON APPEAL	
CLAIM III	33
FLORIDA'S CAPITAL SENTENCING SCHEME IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED BASED ON <u>RING V. ARIZONA</u> , __ U.S. __, 122 S. CT. 2428, 153 L.ED.2D 556 (2002)	
CONCLUSION	39
CERTIFICATE OF SERVICE	40
CERTIFICATE OF COMPLIANCE	40

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGES</u>
<u>Apprendi v. New Jersey</u> , 530 U.S. 466 (2000)	36, 38
<u>Bertolotti v. State</u> , 476 So.2d 130 (Fla. 1985)	16, 23
<u>Brooks v. State</u> , 762 So.2d 879 (Fla. 2000)	18
<u>Burgos v. State</u> , 667 So.2d 1030 (Fla. 2 nd DCA 1996)	31
<u>Campbell v. State</u> , 679 So.2d 720 (Fla. 1996)	14
<u>Cooper v. State</u> , 336 So.2d 1133 (Fla. 1976)	14, 15
<u>Cummings-El v. Florida</u> , 520 U.S. 1277 (1997)	5
<u>Cummings-El v. State</u> , 684 So.2d 729 (Fla. 1996)	2, 5, 10, 35
<u>Ford v. State</u> , 702 So.2d 279 (Fla. 4 th DCA 1997)	18
<u>Freeman v. State</u> , 563 So.2d 73 (Fla. 1990)	20
<u>Garcia v. State</u> , 622 So.2d 1325 (Fla. 1993)	14
<u>Garron v. State</u> , 528 So.2d 353 (Fla. 1988)	23, 24
<u>Geralds v. State</u> , 601 So.2d 1157 (Fla. 1992)	17
<u>Gore v. State</u> , 719 So.2d 1197 (Fla. 1998)	24
<u>Hardwick v. State</u> , 521 So. 2d 1071 (Fla.), <u>cert. denied</u> , 488 U.S. 871 (1988)	30, 33
<u>Johnson v. State</u> , 660 So.2d 637 (Fla. 1995)	14, 15
<u>Jones v. State</u> , 569 So.2d 1234 (Fla. 1990)	15
<u>Jordan v. State</u> , 694 So.2d 708 (Fla. 1997)	15
<u>Kilgore v. State</u> , 688 So. 2d 895 (Fla. 1997)	9
<u>King v. State</u> , 623 So.2d 486 (Fla. 1993)	14

<u>Kormondy v. State</u> , 703 So.2d 454 (Fla. 1997)	20, 21
<u>Medina v. Dugger</u> , 586 So. 2d 317 (Fla. 1991)	8
<u>Parker v. Dugger</u> , 550 So. 2d 459 (Fla. 1989)	8
<u>Rhodes v. State</u> , 547 So.2d 1201 (Fla. 1989)	23, 24
<u>Ring v. Arizona</u> , __ U.S. __, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)	37
<u>Roberts v. State</u> , 568 So. 2d 1255 (Fla. 1990)	9
<u>Ruiz v. State</u> , 743 So.2d 1 (Fla. 1999)	14, 18
<u>State v. Arthur</u> , 390 So. 2d 717 (Fla. 1980)	29
<u>Suarez v. Dugger</u> , 527 So. 2d 190 (Fla. 1988)	8, 25
<u>Teffeteller v. State</u> , 439 So.2d 840 (Fla. 1983)	9, 20, 21
<u>Trease v. State</u> , 768 So.2d 1050 (Fla. 2000)	31, 33
<u>Urbin v. State</u> , 714 So.2d 411 (Fla. 1998)	14, 23
<u>Walker v. State</u> , 707 So.2d 300 (Fla. 1997)	20, 21
<u>Walton v. Arizona</u> , 497 U.S. 639 (1990)	35-37

<u>STATUTES AND RULES</u>	<u>PAGES</u>
Fla. R. App. P. 9.140(b)(3)&(e)(2)	26
Fla. R. App. P. 9.140(b)(5)	26
Fla. Stat. § 90.404 (Fla. 1990)	14
Fla. Stat. § 921.141(3) (1992)	37

PROCEDURAL HISTORY

Petitioner, F.W. Cummings-El, was indicted on March 17, 1992, for the first-degree murder of Kathy Williams Good and for the armed burglary of Daisy Adams' home, wherein Ms. Good was residing at the time of her death. (PL 4-5).¹ After two days of testimony, the jury convicted Mr. Cummings-El on January 29, 1993, as charged in the indictment. (PL 55-56). This Court succinctly stated in its direct appeal opinion the pertinent facts that were elicited at trial:

The defendant, Fred Cummings-El dated the victim, Kathy Good, for a short period and the two lived together for several months. After the relationship ended, Cummings-El harassed Good and she eventually obtained a restraining order after he assaulted her at a neighbor's house. He then made numerous verbal threats, such as: "Kathy, I'm going to kill you. Kathy, I'm going to kill you[]"; and "I love her. If I can't have her, nobody [can] have her"; and finally "If I can't have you, ain't nobody going to have you."

Cummings-El broke into Good's home in the early morning hours of September 16, 1991, and stabbed her several times while she was sleeping, killing her. Several

¹ Reference to the original trial record will be by the symbols "PL" (for the single, separately paginated volume of pleadings) and "TR" (for the six, consecutively paginated volumes of transcripts), followed by the appropriate volume and page number(s). Reference to Petitioner's concurrent post-conviction record on appeal will be by the symbol "PCR" or "PCRS" (for the supplemental record), followed by the appropriate volume and page number(s).

people heard Good's screams and saw Cummings-El at the scene. Good's eight year-old son, Tadarius, was asleep in bed with his mother and awoke to see Cummings-El "punching" his mother. Good's twenty year-old nephew, Michael Adams, was asleep on the floor of Good's bedroom and saw Cummings-El fleeing from the house. And Good's mother, Daisy Adams, confronted Cummings-El as he was leaving the bedroom. Cummings-El, whose face was only one or two feet from Daisy's, shoved Daisy to the ground and ran. Good then staggered from the bedroom and collapsed in her mother's arms, saying "Fred, Fred."

Cummings-El v. State, 684 So.2d 729, 730-31 (Fla. 1996).

Immediately following the jury's verdict, Petitioner's counsel informed the trial court that Mr. Cummings-El was ready to proceed to the penalty phase and "[did] not wish any witnesses called." (TR V 894). At that point, Mr. Cummings-El confirmed that he did not want to present any witnesses on his behalf, including his sister who was in the courtroom. Concerned that Mr. Cummings-El was making an emotional decision following the jury's unfavorable verdict, the trial court reset the penalty phase for the following Wednesday, five days later. (TR V 895-901).

Thereafter, the State presented the testimony of Daisy and Michael Adams, the victim's mother and nephew, respectively, concerning what this Court has characterized as "the duration of Good's state of consciousness after the stabbing." Cummings-El,

684 So.2d at 731; (TR V 925-935, 935-45). The State also admitted certified copies of conviction for three violent felonies Mr. Cummings-El had previously committed. (TR V 945-68).

Petitioner ultimately allowed two of his older sisters to testify on his behalf. In an awkward and halting narrative style, Ms. Diane St. Fleur testified that she had five sisters and six brothers, three of whom had already deceased. She also testified that Mr. Cummings-El had four children of his own, who were sitting in the gallery. She indicated that she was currently caring for his four children, in addition to her own four. In Ms. St. Fleur's opinion, Petitioner treated his family well, was very protective of them, and was honest and nonviolent. Although Petitioner's mother could not be there because she had recently suffered a debilitating stroke, their family was very close, and Ms. St. Fleur asked the jury to spare Mr. Cummings-El's life. (TR VI 1004-09).

Similarly, Ms. Catherine Covington testified that Petitioner was very nice and treated others well, and that he tried to be a good father to his children. She, too, wanted the jury to spare her brother's life. (TR VI 1016-21).

After an hour and thirty-five minutes of deliberation, the jury returned a recommendation of death by a vote of eight to

four. (TR VI 1071-73). Two weeks later, the trial court imposed a sentence of death. In rendering its sentence, the court found the existence of four aggravating factors: that Mr. Cummings-El had three prior violent felony convictions, that he committed the murder during an armed burglary, that he committed the murder in a cold, calculated, and premeditated manner, and that he committed the murder in a heinous, atrocious or cruel manner. In assessing mitigation, the court rejected the proposed statutory mitigating factors of no significant history of prior criminal activity and Petitioner's age at the time of the offense. (TR VI 1076-83). As for nonstatutory mitigation, the trial court made the following comments:

Defendant's two sisters testified that Defendant is a loving father, comes from a close family and has strong family support. Both sisters believe Defendant isn't a violent man in spite of his three prior felony convictions.

However, unlike other trial witnesses, Defendant's sisters did not hear and see his three violent confrontations with Kathy Williams Good before he murdered her. In addition, unlike other trial witnesses, neither sister saw the Defendant running out of Kathy Williams Good's bedroom after he brutally stabbed her.

These two women testified from their hearts. Unfortunately, their family portrait of the Defendant isn't based on fact or in reality as reflected by the evidence of this case.

(TR VI 1084).

The trial court thereafter appointed John H. Lipinski, a private attorney, to represent Mr. Cummings-El on appeal. Mr. Lipinski raised the following six issues: (1) the trial court erred in excusing two jurors for cause, (2) the trial court improperly commented before the jury on Petitioner's right to remain silent, (3) the trial court erred in instructing the jury on the heinous, atrocious, or cruel aggravating factor, (4) the evidence did not support that trial court's finding of the HAC aggravating factor, (5) the evidence did not support the trial court's finding of the cold, calculated and premeditated murder aggravating factor, and (6) Petitioner's sentence of death was disproportionate to other cases resulting from a domestic dispute. Cummings-El, 684 So.2d at 731 n.2.

In affirming Petitioner's convictions and sentence of death, this Court found that trial counsel had not preserved the first three issues for review and, as a result, it refused to consider the merits of those claims. Id. at 731. In addition, it found that the facts supported both the HAC and CCP aggravating factors, and that Petitioner's sentence was not disproportionate. Id. at 731-32

Following this Court's mandate, Mr. Cummings-El filed a petition for writ of certiorari in the United State's Supreme

Court. That Court denied Mr. Cummings-El's petition on June 16, 1997. Cummings-El v. Florida, 520 U.S. 1277 (1997).

The Office of Capital Collateral Regional Counsel for the Southern Region filed a "shell" 3.850 motion on May 13, 1998, but later withdrew as Petitioner's counsel pursuant to a conflict of interest. (PCR I 32-46). The trial court thereafter appointed Lee Weissenborn, a registry attorney, to represent Mr. Cummings-El in his post-conviction proceeding. A year later, Mr. Weissenborn filed an amended 3.850 motion on May 24, 1999, raising the following eleven claims for relief: (I) trial counsel was ineffective for failing to preserve the issue of the improper exclusion of jurors for cause, and for failing to object to the State's method of death-qualifying the jury, (II) trial counsel was ineffective for failing to call Daphne Roberts as a witness during both the guilt and penalty phases of trial, (III) trial counsel was ineffective for failing to request separate verdict forms for the alternate theories of premeditation and felony murder, and for failing to object to the State's argument regarding the alternate theories, (IV) trial counsel was ineffective for failing to object to the trial court's improper comment before the jury regarding Petitioner's right to remain silent, (V) trial counsel was ineffective for failing to investigate and present evidence in mitigation, (VI)

the trial court improperly applied the felony murder and CCP aggravating factors because they were duplicative of the underlying theories of premeditation and felony murder, (VII) the trial court improperly weighed the aggravators and mitigators, (VIII) trial counsel was ineffective for failing to request a second chair lawyer to assist him at the trial, (IX) cumulative errors deprived Petitioner of a fair trial, (X) the trial court improperly considered Petitioner's desire to die in imposing a sentence of death, and (XI) death by electrocution was unconstitutional. (PCR I 49-77). Following a Huff hearing, the trial court granted an evidentiary hearing as to Claim V. (PCR I 80, V 2-58). It further found that Claims I and II were sufficiently refuted by the record, and that Claims III, IV, and VI-XI were all procedurally barred and either legally insufficient to state a claim for relief or refuted by the record. (PCR I 78-96).

In January 2000, Judge Farina discharged Mr. Weissenborn at Petitioner's request and appointed Tony Moss, another registry attorney, to represent him. (PCR I 104-105). Shortly thereafter, Mr. Moss filed two amendments to the 3.850 motion, raising the following four additional claims: (XII) trial counsel was ineffective for failing to argue that the CCP aggravating factor was not appropriate in a domestic case;

(XIII) trial counsel was ineffective for failing to object to the cumulative testimony of Daisy and Michael Adams in the penalty phase; (XIV) trial counsel was ineffective for failing to interview Petitioner's mother and sister for mitigation purposes; and (XV) Tadarius Williams, the victim's son and one of the identification witnesses at trial, had recanted his identification post-trial in the presence of two separate witnesses. (PCR I 112-20; II 132-40). Shortly thereafter, Mr. Moss also filed a Supplemental Argument in Support of Claim 5 of the First Amended [Motion] to Vacate, setting forth the facts underlying the ineffectiveness claim. (PCR II 197-204). Following the State's response (PCR II 163-96), and a second Huff hearing on September 25, 2000 (PCRS III 585-672), a six-day evidentiary hearing commenced on November 29, 2000. The trial court thereafter denied Petitioner's claims by written order on June 14, 2001. (PCR IV 332-45). Petitioner is currently appealing the denial of his motion to vacate. Since Petitioner's direct appeal became final after January 1, 1994, he is filing this Petition for Writ of Habeas Corpus simultaneously with his initial brief in the collateral appeal as required by Florida Rule of Criminal Procedure 3.851(d)(3).

GROUND FOR RELIEF

CLAIM I

APPELLATE COUNSEL WAS INEFFECTIVE
FOR FAILING TO CHALLENGE NUMEROUS
INSTANCES OF PROSECUTORIAL MISCON-
DUCT THAT DEPRIVED PETITIONER OF A
FAIR SENTENCING HEARING.

A habeas corpus petition is the proper vehicle for bringing claims of ineffective assistance of appellate counsel. See Medina v. Dugger, 586 So. 2d 317, 318 (Fla. 1991). When entertaining a habeas petition based on a challenge of ineffective assistance of appellate counsel, this Court must decide "first, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." Suarez v. Dugger, 527 So. 2d 190, 192-93 (Fla. 1988).

Generally, habeas corpus petitions may not be used to challenge matters that were not objected to at trial. Parker v. Dugger, 550 So. 2d 459, 460 (Fla. 1989). However, an exception may be made where appellate counsel fails to raise a claim which, although not preserved at trial, presents a fundamental

error. See Roberts v. State, 568 So. 2d 1255, 1261 (Fla. 1990). A fundamental error is defined as an error that "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Kilgore v. State, 688 So. 2d 895, 898 (Fla. 1997). When it relates to an issue in the penalty phase, the error must "substantially contribute to the jury's advisory recommendation of death during the sentencing proceeding." Teffeteller v. State, 439 So.2d 840, 845 (Fla. 1983).

Here, Petitioner's appellate counsel, John H. Lipinski, unreasonably failed to challenge not only the introduction of improper and highly prejudicial testimony, but also a series of comments made during the State's penalty phase closing argument. Although such testimony and comments were not objected to by trial counsel, Mr. Lipinski had a duty to challenge the improper testimony and comments as fundamental error, since the errors, when considered together, were so egregious as to deprive Petitioner of a fair sentencing hearing. Mr. Lipinski's failure to do so, despite his clear and present duty, compromised the appellate process to such a degree that confidence in the correctness of the result has been undermined, thereby warranting a new sentencing hearing in this cause.

A. Improper Evidence

During the penalty phase, the State presented cumulative and highly prejudicial testimony solely for the purpose of inflaming the jury's sympathy and passion toward the victim in this case. The victim's cousin, Michael Adams, and the victim's mother, Daisy Adams, were the last two witnesses to testify for the State in the guilt phase. Six days later, the prosecutor called them again in the penalty phase to reiterate and punctuate their previous testimony. Neither witness related any additional, relevant information. Rather, they testified solely to invigorate the jury's recollection of the victim's last moments--through the eyes of her grieving family members. The presentation of such testimony was a highly improper effort by the State to appeal to the jury's sympathy and emotions.

On direct appeal, this Court characterized the two witnesses' testimony as follows: "Daisy Adams and Michael Adams testified for the State concerning the duration of Good's state of consciousness after the stabbing." Cummings-El, 684 So.2d at 731. While that may have been the purpose of their testimony, "the duration of Good's state of consciousness" was amply conveyed by the same witnesses' testimony, as well as that of the medical examiner, during the guilt phase. No further

amplification was necessary or appropriate. Rather, it served only to inflame the jury's emotion and to induce them to a recommendation of death.

During the guilt phase, the medical examiner, Dr. Roger Mittleman, testified that the fatal wound was inflicted to the left side of the victim's back, puncturing the lung. (TR IV 675). In his opinion, it would have been a painful wound, and one that the victim would know was very serious. (TR IV 684-85). He opined further that, despite the internal bleeding caused by the wound, the victim would very likely be able to move around, think, and be conscious for some period of time. (TR IV 682-83). She could also talk or scream. (TR IV 683). As the chest cavity filled with blood, however, the victim would feel the compression of her lung, and it would become more difficult to breathe. (TR IV 685). Ultimately, the brain would lose oxygen, and the victim would suffocate to death. (TR IV 681).

Following this testimony, Michael Adams related in the guilt phase that he was sleeping on the floor in the victim's bedroom when the victim started screaming, "I'm cut." He saw an intruder leaving and ran after him. (TR IV 713-14). After the intruder left, Michael called 911 and while he was on the phone he saw the victim stagger into the living room and collapse onto

the television. He ran over to her, and she died in his arms. (TR IV 723-24).

The State's final witness, Daisy Adams, testified in the guilt phase that she was awakened by her daughter's screams, but thought she was just "carrying on." (TR IV 756). Then she heard her daughter say, "Mama, mama, he hurting me," so she went to her daughter's bedroom. There, she was confronted by a man leaving the room. (TR IV 757-58). The man pushed her onto a nearby sofa and fled. (TR IV 762-64). The witness' grandson, Michael Adams, ran after the intruder while she struggled to support her daughter, who had stumbled out of her bedroom. "Just minutes after [the witness] grabbed her," the victim began to collapse, so the witness summoned Michael to support her, while she placed the 911 call. (TR IV 767-70).

This testimony, presented in the guilt phase, sufficiently established "the duration of Good's state of consciousness after the stabbing," but the State wouldn't rest on this evidence. It was determined to refresh the jury's recollection with dramatic, heart-rending testimony from the victim's mother and nephew in the hopes that the jury would demand death as an emotional reaction to the testimony.

During the penalty phase, the substance of Ms. Adams' testimony was exactly the same, but the State used the

disconsolate mother to recount in an emotionally charged atmosphere the last few moments of her daughter's life. In fact, the prosecutor compelled her to reenact the scene, complete with screams and physical gestures. (TR V 926-32). At one point, the prosecutor even simulated being the victim so that the witness could demonstrate how she had strained to keep her daughter standing. (TR V 933-34).

Similarly, the substance of Michael Adams' testimony was identical to that of his guilt-phase testimony. The State merely embellished it to invoke sympathy from the jury. Like his grandmother, Michael Adams was asked to imitate the victim's screams and actions, using the prosecutor as a prop. (TR V 937-42). As an encore, after the witness explained how he had grabbed the victim to keep her from falling to the floor, he revealed for the first time a poignant verbal exchange:

Q. [BY THE PROSECUTOR] What did you say to your aunt after she said I am cut?

A. [BY MICHAEL ADAMS] I said the paramedics coming. Then she said --

Q. Did she say anything after that?

A. Yes.

Q. Show us, not just tell us, but show us what she said next and how she said it?

A. What's taking so long. She said it like that.

Q. Did she say that quieter than everything else she said?

A. Yes.

Q. Did she say it slower than everything else she said?

A. Yes.

Q. After she said what's taking so long what happened?

A. She went like jumping and then her eyes got big and her hands dropped and her head rolled. So I laid her down. She had done went out.

(TR V 941-42) (emphasis added).

Such emotionally charged testimony constitutes the type of prosecutorial grandstanding and "overkill" condemned in many previous cases. E.g., Ruiz v. State, 743 So.2d 1 (Fla. 1999); Urbin v. State, 714 So.2d 411 (Fla. 1998); Campbell v. State, 679 So.2d 720 (Fla. 1996); King v. State, 623 So.2d 486 (Fla. 1993); Garcia v. State, 622 So.2d 1325 (Fla. 1993). Even where, as in the penalty phase, the rules of evidence are relaxed, there remains a two-pronged test for admissibility. Evidence must not only be relevant, but its prejudicial impact must not outweigh its probative value. Fla. Stat. § 90.404 (Fla. 1990); Johnson v. State, 660 So.2d 637, 645 (Fla. 1995) ("The rules of evidence may be relaxed during the penalty phase of a capital trial, but they emphatically are not to be completely

ignored."); Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1976) ("Evidence concerning [irrelevant] matters have no place in [a sentencing] proceeding any more than purely speculative matters calculated to influence a sentence through emotional appeal.").

Here, the Adams' testimony may have been relevant to establish the victim's awareness of her impending death or "the duration of [her] state of consciousness after the stabbing." But these witnesses' guilt phase testimony, as well as that of the medical examiner, adequately related those facts. Repeating their testimony, especially by compelling the victim's mother to simulate the moans and cries of her dying daughter, was both unfairly cumulative and highly prejudicial, greatly outweighing any slight probative value. "It is difficult to remain unmoved by the understandable emotions of the victim's family and friends Thus, the law insulates jurors from the emotional distraction which might result in a verdict based on sympathy and not on the evidence presented." Jones v. State, 569 So.2d 1234, 1239 (Fla. 1990). See also Jordan v. State, 694 So.2d 708, 717 (Fla. 1997) (reversing for resentencing where state improperly presented "testimony [that] served only to build sympathy within the jury for the victim"); cf. Johnson, 660 So.2d at 645 (finding photo of defendant's deceased daughter properly excluded because cumulative and "needlessly

inflammatory"); Cooper, 336 So.2d at 1139 (finding evidence of co-defendant's reputation for violence and defendant's previous attempts to avoid co-defendant properly excluded as irrelevant and inflammatory).

Because of the fundamentally prejudicial nature of this testimony, appellate counsel should have challenged the admission of this testimony on appeal, despite trial counsel's failure to object. Together with the series of improper comments in the State's penalty phase closing argument, detailed infra, this inflammatory testimony deprived Petitioner of a fair sentencing hearing. As a result, this Court should grant habeas relief, vacate Petitioner's sentence of death, and remand for an immediate re-sentencing hearing.

B. Improper Comments in Closing

As this Court has previously stated,

[t]he proper exercise of closing arguments is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.

Bertolotti v. State, 476 So.2d 130, 134 (Fla. 1985).

In the present case, counsel for the State, Mr. Donald Ungurait, made not one or two offhand comments that could be deemed harmless, or nonprejudicial, under the facts of this case. Rather, Mr. Ungurait's closing argument was replete with improper comments that were so egregious, inflammatory, and unfairly prejudicial that they deprived Petitioner of a fair and reliable sentencing hearing. These comments, though discussed singularly herein, combined to confuse and mislead the jury about its proper role in sentencing, thereby adversely affecting the jury's recommendation.

As his first effort to confound the jury, the prosecutor listed the four statutory aggravating factors that he was relying upon in this case. Thereafter, he invited the jury to consider in aggravation anything else in the record that it believed was aggravating in nature:

After you have considered [these four aggravating factors] and after you have determined which ones have been established, you then take those aggravating factors and consider them in combination with, together with the factors that you know occurred in this crime, the way the murder happened and using those aggravating factors and the facts of this crime you make a decision about whether or not the death penalty or the life imprisonment is the appropriate sanction.

(TR VI 1033) (emphasis added).

By these comments, the State erroneously urged the jury to consider nonstatutory aggravation in clear violation of the law. "This Court has long held that aggravating circumstances must be limited to those provided for by statute." Geralds v. State, 601 So.2d 1157, 1162 (Fla. 1992). Yet the State urged the jury to consider not only the four enumerated factors, but anything else it chose to rely on in making its decision. Such argument was improper.

Next, in discussing the trial court's role in sentencing, the State suggested that there were matters outside the record, to which the jury was not privy, that the trial court could consider in determining the ultimate sentence: "What happens then ladies and gentlemen is in combination with some other factors your advisory sentence is considered by the judge." (TR VI 1035) (emphasis added). Reference to matters outside the evidence, matters of which the jury was unaware, left the jurors to wonder what "other factors" existed that the judge was allowed to consider, but that they were not, in deciding between life imprisonment and death by electrocution. Since the State was mentioning them, the jury was left to conclude that these "other factors" were aggravating in nature. Leaving the jury with this inference was improper and highly inflammatory, thereby depriving Petitioner of a fair sentencing hearing. See

Ford v. State, 702 So.2d 279, 281 (Fla. 4th DCA 1997) ("An argument suggesting to the jury that there is evidence harmful to the accused that the jury did not hear is highly improper."); Ruiz v. State, 743 So.2d 1, 4 (Fla. 1999) (reiterating that an attorney "may not suggest that evidence which was not presented at trial provides additional grounds for finding the defendant guilty.").

Immediately thereafter, the prosecutor began discussing the aggravating factors in detail. Regarding the felony murder aggravator, the State improperly bolstered the weight of its evidence by arguing that the trial court had already sanctioned the existence of this factor:

First of all, felony murder. The Judge took judicial notice before we rested of the fact that your verdict reflected the defendant had done this homicide or committed this murder during the course of his committing a burglary and we discussed this to [sic] you in closing the case.

(TR VI 1035) (emphasis added). Using the trial court's status and legal authority--its position of power--to bolster the existence and weight of this aggravating factor was clearly improper. Cf. Brooks v. State, 762 So.2d 879, 901-02 (Fla. 2000) (finding state's argument improper where prosecutor used authority of office to argue that defendant's case had been pre-screened and warranted death penalty).

But perhaps the most egregious of the State's comments came when it argued Petitioner's future dangerousness:

What [Petitioner's prior violent felony convictions] also tell[] you ladies and gentlemen is that this is a man who has not only done violent acts but [has] been confronted by the judicial system. He has been the recipient of its mercy. He has faced up with an opportunity to rehabilitate himself, to take advantage of his knowledge as he confronts each of these crimes in court.

Ladies and gentlemen, what do we learn? He does armed robberies in '84. He gets convicted. He still goes out in 1990, does an aggravated battery. And even after these brushes with the law and these brushes with the system and these opportunities to rehabilitate himself, to turn his life around, this man kills Kathy Williams Goode [sic] in a brutal, violent, horrible way.

Ladies and gentlemen, these convictions in the defendant's history show you about the potentiality for this defendant to be rehabilitated in this situation. And I submit to you that his history of violent convictions and his failure to rehabilitate himself and take advantage of those opportunities in the past tells you about the potentiality for that happening this time.

I submit to you this defendant is not going to be rehabilitated. We have established this aggravating factor beyond a reasonable doubt.

(TR VI 1038-39) (emphasis added).

The defense had not made Petitioner's potential for rehabilitation an issue in this case. As a result, the State

had no authority upon which to raise the issue and then tear it down. By doing so, it once again urged the jury to consider nonstatutory aggravation. Declaring that Petitioner had not rehabilitated himself and would not do so if sentenced to life imprisonment, the State was in essence arguing that Petitioner would be a threat to the safety of others both in prison and, if applicable, upon his release from prison. In other words, the State used fear and intimidation to ensure that the jury voted for death.

This Court has repeatedly condemned such arguments. See Teffeteller v. State, 439 So.2d 840, 844-45 (Fla. 1983) (reversing death sentence due to prosecutor's repeated statements that defendant would kill again if sentenced to life imprisonment); Kormondy v. State, 703 So.2d 454, 460-63 (Fla. 1997) (reversing death sentence due to testimony that defendant would kill surviving victims if released from prison); Freeman v. State, 563 So.2d 73, 76 (Fla. 1990) (finding state's comment improper, "How many times is this going to happen to this defendant?"); Walker v. State, 707 So.2d 300, 313-14 (Fla. 1997) (finding state's question to mental health expert improper, "Well, do you think also that [Walker] may kill again?").

As in Teffeteller, "[t]he intended message to the jury was clear: unless the jury recommended the death penalty, the

defendant, in due course, will be released from prison and will kill again." 439 So.2d at 845. Only in this case, the message was even clearer: unless the jury recommended the death penalty, the defendant would continue his violent behavior in prison and beyond. As this Court admonished in Teffeteller, "[t]here is no place in our system of jurisprudence for this argument." Id. See also Walker, 707 So.2d at 314 ("This Court has explained that 'the probability of recurring violent acts by the defendant if he is released on parole in the distant future' is not a proper aggravating circumstance in Florida."); Kormondy, 703 So.2d at 463 ("It is important to note that our death penalty statute does not authorize a dangerousness aggravating factor.").

Finally, in its ultimate zeal to "win" a death recommendation, the State doggedly worked to inflame the passions of the jury by inviting it to imagine the victim's pain and suffering as it acted out the victim's last moments of life. To set the stage, the prosecutor assaulted the jurors with gruesome autopsy photographs of the wounds to the victim's body, claiming they had "some different bearing now than [they] did in the guilt phase." (TR VII 1041). Then he led them on a journey into the victim's mind, through the final moments of her life,

as if an actor in a play, reading a script, encouraging the jurors to become her:

The medical examiner talked to you about her ability to be aware that each breath she took was harder to get. The pressure builds in her body cavity. Gasping for air, the consciousness of the fact you are not getting the oxygen. And we have all had the situation where we have either been in a pool or water and you get to that point where you are in the water and you just don't know if you are going to make it to the surface.

Kathy Williams Goode [sic] was conscious of that. We know that she stood for awhile and that she gradually lost strength. We know that her voice slowed down. We know that her ability to speak went [from] a high volume to a low volume. Starting from just screams of pain, (indicating) to what's taking so long.

Kathy Williams Goode [sic] when she talked to Michael Adams began to realize that her desperate efforts to keep herself awake and to fight were getting dangerously to the end. Where are the paramedics? Why are they taking so long? You know that she realized she was going and that she desperately needed the help. So mentally and emotionally.

First of all, you have to think and use your common sense. This is a woman who is asleep peacefully in her bed with her son beside her and what wakes her up? A sharp pain of a knife going in her back and puncturing her lungs [sic]. It startles her. She screams. We scream when we are afraid. We scream when we feel pain.

You know the feeling of panic as you try and draw breath and the breath gets hard and

you can't get any oxygen. We know she realized how serious her wound is as she tells her mother as she told it and to state, mama I am cut, cut. She sits with Michael, Michael her nephew holding her in his arms and tries to comfort her and she tells him I am cut. Don't worry Kathy, you will be okay, you will be alright. The paramedics are coming. What's taking so long[? Before she convulses and losses [sic] consciousness.

I think also probably the best illustration I think, the best demonstration of just how bad this was to Kathy Williams how much she suffered and what she realized was happening to her is her cries.

What did she cry after her initial scream? She cried mama, he hurt me, mama, he cut me. Ladies and gentlemen, when do we cry for our mothers? When we are the most afraid, when we are in the most pain, when we know we need protection and help. When as adults do we cry for help?

(TR VI 1044-46) (emphasis added).

In condemning a similar, but less egregious, "golden rule" argument, this Court in Bertolotti, 476 So.2d at 134, reiterated that closing arguments "must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law." This Court reaffirmed that ruling most recently in Urbini:

[T]he prosecutor, as in Garron, went far beyond the evidence in emotionally **creating an imaginary script** demonstrating that the

victim was shot while "pleading for his life." We find that, as in Garron, the prosecutor's comments constitute a subtle "golden rule" argument, a type of emotional appeal we have long held impermissible. By literally putting his own imaginary words in the victim's mouth, i.e., "Don't hurt me. Take my money, take my jewelry. Don't hurt me," the prosecutor was apparently trying to "unduly create, arouse and inflame the sympathy, prejudice and passions of [the] jury to the detriment of the accused."

714 So. 2d at 420-21 (Fla. 1998) (emphasis added) (quoting Barnes v. State, 58 So. 2d 157, 159 (Fla. 1951)). See also Rhodes v. State, 547 So.2d 1201, 1205 (Fla. 1989) (reversing for resentencing where prosecutor urged jury, among other things, "to place themselves in the hotel during the victim's murder"); Garron v. State, 528 So.2d 353, 358-59 (Fla. 1988) (reversing for resentencing where prosecutor urged jury, among other things, to "[i]magine the anguish and the pain that [the victim] felt as she was shot and drug [sic] herself from the bathroom into the bedroom where she expired").

The cumulative effect of both the improper penalty phase testimony and the series of prejudicial comments during closing argument prejudiced Mr. Cummings-El in the eyes of the jury. Such impropriety contributed substantially to the jury's decision to recommend a sentence of death. Gore v. State, 719 So.2d 1197, 1197 (Fla. 1998) (reversing for new trial "based on the cumulative effect of the prosecutor's improper

cross-examination of Gore and improper closing argument");
Rhodes, 547 So.2d at 1206. As this Court found in Garron,

These statements when taken as a whole and fully considered demonstrate the classic case of an attorney who has overstepped the bounds of zealous advocacy and entered into the forbidden zone of prosecutorial misconduct. In his determination to assure that appellant was sentenced to death, this prosecutor acted in such a way as to render the whole proceeding meaningless.

528 So.2d at 359.

After all, despite the minimal evidence in mitigation in Petitioner's case, four jurors recommended life. It is simply impossible to say that two more jurors would not have voted for life had the State not injected elements of emotion and fear into the jury's deliberation. Because of the prejudice flowing from the State's consistent and persistent reliance upon misleading and inflammatory evidence and argument, Mr. Lipinski's failure to raise this issue on appeal fell measurably outside the range of professionally acceptable performance and thereby compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. Suarez v. Dugger, 527 So. 2d 190, 192-93 (Fla. 1988). As a result, this Court should grant habeas relief in this matter, vacate Petitioner's sentence of death, and remand to the trial court for an immediate re-sentencing.

CLAIM II

APPELLATE COUNSEL WAS INEFFECTIVE FOR
FAILING TO ENSURE PROPER PREPARATION OF THE
RECORD ON APPEAL.

On direct appeal, this Court considers only those claims of error that appear conclusively in the record. As a result, it is incumbent upon an appellate counsel to ensure that the record on appeal is accurate and complete so that he or she can identify and raise all appropriate claims for relief. Without a complete and accurate record, an appellant cannot effectively ascertain and challenge on appeal those errors committed either by the State or by the trial court during his or her trial.

Unfortunately for Mr. Cummings-El, both his trial counsel and his appellate counsel failed to render effective assistance of counsel in this regard, thereby depriving Mr. Cummings-El of his rights to due process, access to courts, and a fair trial.² As outlined in Florida Rules of Appellate Procedure 9.140(b)(3)&(e)(2), Petitioner's trial counsel had the duty to file a timely notice of appeal, as well as a statement of

² Petitioner is not challenging trial counsel's ineffectiveness herein. He is merely relating the circumstances that led to the breakdown of appellate counsel's effective representation. After all, trial counsel has already been ruled ineffective for his deficient conduct in this regard. (PL 99-106).

judicial acts to be reviewed and a designation to the court reporter indicating which court proceedings should be transcribed and included in the record on appeal. In the present case, trial counsel, Theodore Mastos, orally moved for discharge within moments of the court's pronouncement of sentence. Contrary to Florida Rule of Appellate Procedure 9.140(b)(5),³ the trial court granted the motion and immediately

³ This rule provides in pertinent part as follows:

Withdrawal of Defense Counsel after Judgment and Sentence. The attorney of record for a defendant in a criminal proceeding shall not be relieved of any professional duties, or be permitted to withdraw as counsel of record, except with approval of the lower tribunal on good cause shown on written motion, until after

(A) the following have been completed:

(i) The notice of appeal has been filed.

(ii) The statement of judicial acts to be reviewed has been filed, if a transcript will require the expenditure of public funds.

(iii) Directions to the clerk have been filed, if necessary.

(iv) A designation of that portion of the reporter's transcript necessary to support the statement of judicial acts to be reviewed has been filed, if a transcript will require expenditure of public funds.

(v) Substitute counsel has been obtained or

(continued...)

appointed the Public Defender's Office for the appeal, despite that agency's previous certification of conflict in this case. (TR VI 1087). Although Mr. Mastos assured the court that he would "assist the public defender's office in filling out the paperwork so that [Petitioner's] case [didn't] just fall through the cracks," he did not do so, and Petitioner's case did, in fact, fall through the cracks. (TR VI 1087).

Not only did Mr. Mastos not file a timely notice of appeal or statement of judicial acts and designation to the court reporter, the public defender's office, through a clerical error, similarly failed to file a notice of appeal. When the public defender's office recognized its error (three months later), it re-certified its conflict, and the trial court thereafter appointed John H. Lipinski to represent Mr. Cummings-El on appeal. (PL 86, 87).

³ (...continued)

appointed, or a statement has been filed with the appellate court that the appellant has exercised the right to self-representation. In publicly-funded cases, the public defender for the local circuit court shall initially be appointed until the record is transmitted to the appellate court.

Or

(B) the time has expired for the filing of notice of appeal, and no such notice has been filed.

Six months after the trial court had rendered Petitioner's conviction and sentence, it granted Mr. Lipinski's motion for post-conviction relief. It found Mr. Mastos ineffective for failing to file a timely notice of appeal and authorized Mr. Lipinski to file a belated notice of appeal, which he did two months later. (PL 99-106). Though completely unfamiliar with the case, Mr. Lipinski also filed a statement of judicial acts to be reviewed and a designation to the court reporter. However, he failed to include in the designation a critical hearing held on January 4, 1993.⁴ (PL 107-08).

At this January 4, 1993, hearing, which occurred thirteen months after Mr. Mastos' appointment for trial, and three weeks before the scheduled trial date, Mr. Mastos informed the trial court, the Honorable Joseph Farina, that he had done nothing to prepare for the penalty phase and had yet to hire an investigator. His stated reason for such inaction was Petitioner's alleged desire not to present witnesses who would "beg for his life." **App. A** at 4-6. Given his client's position, Mr. Mastos urged the court to question Petitioner about his decision not to call penalty phase witnesses on his

⁴ The State introduced into evidence the transcripts from this January 4 hearing at Petitioner's 3.851 evidentiary hearing. It was designated as State's Exhibit #8. For this Court's convenience, Petitioner has appended it to this petition as **Appendix A**.

behalf. Both Mr. Mastos and the prosecutor also urged the court to require Mr. Cummings-El to undergo a psychiatric evaluation to ensure that he was competent to waive mitigation. In response to the court's questioning, Petitioner indicated on two separate occasions that Mr. Mastos was welcome to contact his family members or anyone else he wanted to talk to regarding mitigation, but that he (Petitioner) did not want his family begging for his life since he was innocent of the charges. **App. A** at 6, 13.

During the discussion, Petitioner also became quite outspoken in his complaint that Mr. Mastos had not scheduled an Arthur⁵ hearing in his case. **App. A** at 14-15. Mr. Mastos conceded that his client had requested such a hearing and that he had not scheduled one, because in his opinion "it would be a complete and total waste of time. There is absolutely no judge in the system that when given [the witnesses' depositions or sworn statements] is going to find proof not evident, nor presumption great." **App. A** at 17.

Following Mr. Mastos' comments regarding the undeniable strength of the State's case, Mr. Cummings-El vehemently

⁵ State v. Arthur, 390 So. 2d 717 (Fla. 1980) (affirming trial court's discretion to grant or deny bail for person accused of offense punishable by life, or capital offense, when proof of guilt is evident or presumption great).

requested that the court discharge his attorney because "it don't appear to me he's working on my best interest, but working with the prosecutor." **App. A** at 19. Petitioner also complained that Mr. Mastos had only been to see him twice in the past year and was pressuring him to accept the State's plea agreement to second-degree murder. **App. A** at 20. When asked by the court to detail his efforts on Mr. Cummings-El's behalf, Mr. Mastos explained only that he had taken several depositions and had given copies of those depositions, as well as the police reports, to Petitioner. **App. A** at 20-21. Thereafter, the trial court made no ruling regarding Petitioner's motion to dismiss counsel, nor did it inform Petitioner of his right to self-representation. **App. A** at 22-23.

From this brief exchange, it is quite evident that the trial court failed to conduct an adequate inquiry into Petitioner's claims of ineffectiveness. In Hardwick v. State, this Court adopted the proper procedure a trial court must follow when a defendant wishes to discharge his court-appointed counsel prior to trial due to counsel's incompetency:

The trial judge should make a sufficient inquiry of the defendant and his court appointed counsel to determine whether or not there is reasonable cause to believe that the court appointed counsel is not rendering effective assistance to the defendant. If reasonable cause for such

belief appears, the court should make a finding to that effect on the record and appoint a substitute attorney who should be allowed adequate time to prepare the defense. If no reasonable basis appears for a finding of ineffective representation, the trial court should so state on the record and advise the defendant that if he discharges his original counsel the State may not thereafter be required to appoint a substitute.

521 So. 2d 1071, 1074-75 (Fla.) (emphasis added), cert. denied, 488 U.S. 871 (1988) (adopting Nelson v. State, 274 So. 2d 256, 258-59 (Fla. 4th DCA 1973). See also Trease v. State, 768 So.2d 1050, 1053 (Fla. 2000) ("If the court finds that the defendant does not have a legitimate complaint, then the court **is required** to advise the defendant that if his request to discharge is granted, the court is not required to appoint substitute counsel and that the defendant would be exercising his right to represent himself." (emphasis added)); cf. Burgos v. State, 667 So.2d 1030, 1031-32 (Fla. 2nd DCA 1996) (finding inquiry inadequate where court failed to question defense counsel as necessary step in process).

Here, the trial court made an insufficiently cursory inquiry of both Mr. Cummings-El and Mr. Mastos regarding Petitioner's allegations of incompetence. Had the court considered the matter thoughtfully, it would have found reasonable cause to believe that Mr. Mastos was rendering ineffective assistance to

his client. After all, Mr. Mastos had just informed the court that, thirteen months after his appointment and three weeks before trial, he "[hadn't] done anything on the penalty phase." **App. A** at 5. In fact, he had not even bothered to hire an investigator. **App. A** at 14. Despite Petitioner's open invitations to contact his family or friends, Mastos had made no attempt to do so and would ultimately make no attempt to do so.

A quick perusal by the trial judge of the court file would have also revealed that Mr. Mastos had not filed a single pleading on Mr. Cummings-El's behalf--not a motion, not a response, not anything.⁶ And despite the prosecutor's assertion that Mr. Mastos had deposed "every significant material witness in this case," he had yet to depose, three weeks prior to trial, a witness the prosecutor was "going to provide" sometime before trial. **App. A** at 21-22. Regardless, taking depositions, which is all Mr. Mastos alleged that he had done on Mr. Cummings-El's behalf, could hardly be considered extensive trial preparation. Petitioner was proclaiming his innocence while Mr. Mastos, convinced of his guilt, was pressuring him to accept the State's plea offer to second-degree murder. Had the trial court carefully considered Petitioner's allegations, which were

⁶ The record on appeal contains not a single pleading filed by Mr. Mastos after his notice of appearance in February 1992.

validated by Mr. Mastos' admissions that he had done nothing in preparation for trial, the court would have concluded that Mr. Mastos was rendering ineffective assistance of counsel and, thus, should be discharged.

Even were Petitioner's allegations insufficient to warrant discharge, however, the trial court failed to rule on Mr. Cummings-El's motion, as required by Nelson and its progeny, and failed to inform Petitioner of his option of self-representation. By doing so, the trial court deprived Petitioner of his right to counsel and his alternative right to waive counsel. See Hardwick, 521 So. 2d at 1074-75; Trease v. State, 768 So.2d 1050, 1053 (Fla. 2000).

Critically, Mr. Lipinski, Petitioner's appellate counsel, failed to challenge the trial court's actions (or inaction) because he (Lipinski) failed to ensure the complete and accurate preparation of the record on appeal. His failure to do so prejudiced Petitioner's right to raise a meritorious issue on appeal. As a result, this Court should grant habeas relief in this matter, vacate Petitioner's conviction, and remand to the trial court with instructions to conduct a new trial.

CLAIM III

FLORIDA'S CAPITAL SENTENCING SCHEME IS
UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED
BASED ON RING V. ARIZONA, __ U.S. __, 122 S.
CT. 2428, 153 L.ED.2D 556 (2002).

A grand jury indicted Petitioner for the first-degree premeditated or felony murder of Kathy Williams Good, allegedly committed in violation of Florida Statutes § 775.082(1) (1990). (TR I 4-5). Following two days of testimony, the jury found Petitioner guilty of first-degree murder as charged in the indictment, without specifying the particular basis for its verdict, i.e., premeditated or felony murder. (TR I 55-56). A week later, the trial court conducted a separate sentencing proceeding wherein both the State and Petitioner presented additional evidence and argument relating to the appropriate sentence in this case. (TR V 903-1000, VI 1001-75). Following the presentation of such evidence, the jury returned a recommendation of death by a vote of eight to four, but did not indicate what evidence it had relied upon; which aggravating factors, if any, it had found to exist; which mitigating factors, if any, it had found to exist; or how it had weighed the evidence in determining its recommended sentence.

With no factual findings from the jury upon which to guide its sentencing decision, the trial court embarked on its own analysis of the evidence and made its own factual findings relating thereto. Ultimately, it found the existence of four

aggravating factors. Rejecting all of Petitioner's mitigating evidence, it determined that Petitioner's sentence should be enhanced from life imprisonment to death. (TR I 94-98).

On direct appeal, this Court noted the jury's recommendation, but relied entirely upon the trial court's findings to determine whether the death sentence was properly imposed:

Cummings-El next contends that this was a hot-blooded crime of passion and that the court erred in finding the killing cold, calculated, and premeditated. We disagree. As the court pointed out in its sentencing order, the record is replete with evidence of heightened premeditation. . . . We find no error.

Finally, Cummings-El claims that his death sentence is disproportionate. We disagree. . . . In the present case, the trial court found four aggravating circumstances and virtually nothing in mitigation. We find no error.

Cummings-El, 684 So.2d at 731-32 (emphasis added).

In Walton v. Arizona, 497 U.S. 639 (1990), the United States Supreme Court upheld a challenge to Arizona's death sentencing statute, which directed the trial court to determine in a separate sentencing hearing that there exists "'one or more of the aggravating circumstances enumerated in [the statute] and that there are no mitigating circumstances sufficiently substantial to call for leniency.'" Id. at 644 (quoting Ariz.

Rev. Stat. Ann. §§13-703(E) (1989)). In doing so, the Court relied upon its rulings to previous challenges of Florida's death penalty statute, finding the two states' sentencing procedures indistinguishable:

We repeatedly have rejected constitutional challenges to Florida's death sentencing scheme, which provides for sentencing by the judge, not the jury. Hildwin v. State, 490 U.S. 638 . . . (1989) (per curiam); Spaziano v. Florida, 468 U.S. 447 . . . (1984); Proffitt v. Florida, 428 U.S. 242 . . . (1976). In Hildwin, for example, we stated that "[t]his case presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida," 490 U.S., at 638 , and we ultimately concluded that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Id.*, at 640-641.

The distinctions Walton attempts to draw between the Florida and Arizona statutory schemes are not persuasive. It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances, and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.

497 U.S. at 647-48.

More recently, in Apprendi v. New Jersey, 530 U.S. 466 (2000), the United States Supreme Court reversed an enhanced

sentence under a "hate crime" statute, holding that "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 490. This is so because the Sixth Amendment does not permit a defendant to be "exposed . . . to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." Id. at 483 (emphasis added). Despite vehement dissents by several members of the Court, the majority stopped short in Apprendi of applying this ruling to death penalty sentencing schemes, relying upon its ruling in Walton:

Finally, this Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death. Walton v. Arizona, 497 U. S. 639, 647-649 (1990) For reasons we have explained, the capital cases are not controlling[.]

530 U.S. at 496.

Finally, in Ring v. Arizona, __ U.S. __, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), the Supreme Court settled the issue. In striking down Arizona's capital sentencing scheme, it overruled Walton in relevant part, holding that "[c]apital defendants, no less than non-capital defendants, . . . are entitled to a jury

determination of any fact on which the legislature conditions an increase in their maximum punishment." 122 S.Ct. at 2432.⁷

Like the statutory scheme in Arizona, Florida's death penalty statute currently, and at the time of Petitioner's trial, mandates as the maximum penalty for first-degree murder the imposition of a life sentence. This is the only applicable sentence unless, after a separate sentencing proceeding, the trial court makes additional factual findings as to the existence or nonexistence of aggravating and mitigating factors, and the weight to be accorded each. Fla. Stat. § 921.141(3) (1992).⁸ Thus, by its effect, the finding of such additional facts exposes defendants, like Petitioner, to a greater punishment than that authorized by the jury's guilty verdict. See Ring, 122 S.Ct. at 2440-41. By its nature then, Florida's capital sentencing statute allows for the enhancement of the penalty beyond the prescribed statutory maximum. But it allows such enhancement based solely on the trial court's findings of facts.

⁷ Since Walton's analysis was premised upon the Court's previous rulings in Hildwin, Spaziano, and Proffitt, the Court in effect overruled these cases as well.

⁸ "In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings."

Under Ring, this is clearly unconstitutional. "Because [Florida's] enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' Apprendi, 530 U.S. at 494, n.19, the Sixth Amendment requires that they be found by a jury." Ring, 122 S.Ct. at 2443. As a result, the State must list the applicable aggravating factors in the indictment as essential elements to be proven at trial, and the jury must make specific findings as to those aggravating factors that were proven beyond a reasonable doubt and that it unanimously relied upon in recommending a sentence of death. Since Florida's capital sentencing scheme does not comport with the requirements of Ring, it is unconstitutional on its face.

Moreover, since neither the State nor the trial court complied with the mandates of Ring in Petitioner's case, Florida's capital sentencing scheme is unconstitutional as applied to him. No aggravating factors were listed in Petitioner's indictment, and the jury made no specific findings of fact that one or more aggravating factors had been proven beyond a reasonable doubt, or that there were insufficient mitigating factors to outweigh the aggravation. Therefore, Petitioner's sentence was improperly enhanced by the trial court beyond the statutory maximum. As a result, this Court should grant habeas relief in this matter, vacate Petitioner's sentence

of death, and remand to the trial court for an immediate re-sentencing.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, Appellant, F.W. CUMMINGS-EL, respectfully requests that this Honorable Court grant this petition for writ of habeas corpus and remand this cause for a new trial, a new sentencing hearing, or such other relief as this Court deems appropriate.

Respectfully submitted,

SARA D. BAGGETT, ESQ.
Fla. Bar No. 0857238
2311 23rd Way
West Palm Beach, FL 33407
(561) 683-0666

CO-COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to Sandra Jaggard, Assistant Attorney General, 444 Brickell Avenue, Miami, Florida; Tony Moss, Esquire, Law Office of Tony Moss, P.a., 851 N.E. 118th Street, Miami, Fl 33161; and F.W. Cummings-El, Inmate # 120190, Union Correctional Institution, P.O. Box 221, Raiford, Florida 32083, this ____ day of August, 2002.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is Courier New, 12 point, a font that is not proportionately spaced.

SARA D. BAGGETT, ESQ.