

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-1948

GUY RICHARD GAMBLE,

Petitioner,

v.

MICHAEL W. MOORE,

Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Article 1, Section 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. These claims demonstrate that Mr. Gamble was deprived of the right to a fair, reliable trial and individualized sentencing proceeding and that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives.

Citations shall be as follows: The record on appeal concerning the original court proceedings shall be referred to as "R. ___" followed by the appropriate page numbers. The Appellant's Initial Brief on direct appeal will be referred to as "IB. ___" followed by the appropriate page numbers. The postconviction record on appeal will be referred to as "PC-R. ___" followed by the appropriate page numbers. All other references will be self-explanatory or otherwise explained herein.

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INTRODUCTION

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

The issues, which appellate counsel neglected, demonstrate that counsel's performance was deficient and that the deficiencies prejudiced Mr. Gamble. "[E]xtant legal principles . . . provided a clear basis for . . . compelling appellate argument[s]." *Fitzpatrick v. Wainwright*, 490 So.2d 938, 940 (Fla. 1986). Neglecting to raise fundamental issues such as those discussed herein "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." *Wilson v. Wainwright*, 474 So.2d 1162, 1164 (Fla. 1985). Individually and "cumulatively," *Barclay v. Wainwright*, 444 So.2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." *Wilson*, 474 So.2d at 1165 (emphasis in original).

Additionally, this petition presents questions that were ruled on at trial or on direct appeal but should now be revisited in light of subsequent case law or in order to correct error in the appeal process that denied fundamental

constitutional rights. As this petition will demonstrate, Mr. Gamble is entitled to habeas relief.

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

This is an original action under Fla.R.App.P. 9.100(a). See Art. 1, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla.R.App.P. 9.030(a)(3) and Art. V, Sec. 3(b)(9), *Fla. Const.* The Petition presents constitutional issues which directly concern the judgment of this Court during the appellate process and the legality of Mr. Gamble's sentence of death.

Jurisdiction in this action lies in this Court, *see, e.g., Smith v. State*, 400 So.2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Gamble's direct appeal. *See Wilson*, 474 So.2d at 1163 (Fla. 1985); *Baggett v. Wainwright*, 392 So.2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Gamble to raise the claims presented herein. *See, e.g., Way v. Dugger*, 568 So.2d 1263 (Fla. 1990); *Downs v. Dugger*, 514 So.2d 1069 (Fla. 1987); *Riley v. Wainwright*, 517 So.2d 656 (Fla. 1987); *Wilson*, 474 So.2d at 1162.

This Court has the inherent power to do justice. The ends

of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. The petition pleads claims involving fundamental constitutional error. See *Dallas v. Wainwright*, 175 So.2d 785 (Fla. 1965); *Palms v. Wainwright*, 460 So.2d 362 (Fla. 1984). The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Gamble's claims.

GROUND FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Gamble asserts that his capital conviction and sentence of death were obtained and then affirmed during this Court's appellate review process in violation of his rights as guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

PROCEDURAL HISTORY

Guy Richard Gamble, the defendant, was charged by way of Indictment for conspiracy to commit armed robbery, armed robbery with a deadly weapon and first degree murder of Helmut Kuehl. (R. C08-07) The case proceeded to a jury trial in Lake County

Circuit Court before the Honorable Richard Singletary, Judge presiding. On June 25, 1993, the jury returned unanimous verdicts of guilty on all counts. (R. 1462-63).

On June 28, 1993, the case proceeded to penalty phase before the same jury. After hearing matters in aggravation and mitigation, the jury advised and recommended by a vote of 10 to 2 that defendant be sentenced to death. (R. 1859).

On August 10, 1993, the Court sentenced defendant to death, a consecutive life sentence for armed robbery and consecutive 15 years prison term for conspiracy to commit armed robbery. (R.2082-83).

On May 25, 1995, the Supreme Court of Florida affirmed defendant's sentence and conviction in *State v. Gamble*, 659 So. 2d 242 (Fla. 1995).

On February 20, 1996, the United States Supreme Court denied defendant's Petition for Writ of Certiorari in *Gamble v. Florida*, 516 U.S. 1122, 116 S.Ct. 933, 133 L.Ed.2d 860 (1996). Fla.R.Crim.P. 3.850(c)(2).

On or about March 17, 1997, defendant filed a Motion to Vacate Judgments of Conviction and Sentence With Special Request for Leave to Amend.

On September 20, 1999, Mr. Gamble filed his amended Motion to Vacate Judgment under authority of Fla.R.Crim.P. 3.850 and

F.S. 924.066 seeking collateral relief from his judgments of conviction for first degree murder, armed robbery, conspiracy to commit armed robbery, sentence of death, consecutive life sentence and consecutive 15 year sentence, respectively. Fla.R.Crim.P. 3.850 (c)(5). Mr. Gamble filed a Motion to Supplement Rule 3.850 Motion with Additional Claims XI and XII on July 20, 2000.

A hearing was held on February 10, 2000, pursuant to *Huff v. State*, 622 So.2d 982 (Fla. 1993). On October 20, 2000, the court entered its *Huff* order *nunc pro tunc* to February 10, 2000, as to Claims I - X and August 23, 2000, as to Claims XI and XII. In that order, the court granted an evidentiary hearing on Claims I through V and XI and XII while denying Claims VI through X of the Rule 3.850 Motion as amended and supplemented.

An evidentiary hearing was held by the trial court on August 23 and 24, 2001, on Claims I - V and XI and XII of his Rule 3.850 motion. By order dated January 8, 2002, the court denied relief to Mr. Gamble as to the evidentiary hearing claims and an appeal to this Honorable Court was subsequently and duly noticed. This petition is being filed simultaneously with the Rule 3.850 appeal pursuant to Fla.R.App.R. 9.140(b)(6)(e).

Mr. Gamble remains incarcerated at Union Correctional Institute under a sentence of death by a Court established by

the Laws of Florida within the meaning of Fla.R.Crim.P. 3.850(a) and Fla. Stat. § 924.066.

ARGUMENT I

THE TRIAL COURT FAILED TO CONDUCT A PROPER *NELSON/FARETTA* HEARING DURING THE PUBLIC DEFENDER CONFLICT WAIVER HEARING AND RENDERED MR. GAMBLE'S DEATH SENTENCE UNRELIABLE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS CLAIM ON DIRECT APPEAL.

Prior to Mr. Gamble's trial, the trial court had occasion to consider a potential conflict of issue regarding Mr. Gamble's continued representation by the Public Defender's Office. In conducting that hearing, the trial court failed to follow the procedures of inquiry as presented in *Nelson v. State*, 274 So.2d 256 (Fla. 4th DCA 1973). See *Hardwick v. State*, 521 So.2d 1071, at 1074-75 (Fla. 1988). In particular, the trial court significantly failed to advise Mr. Gamble that if he discharged the Public Defender that the State may not thereafter be required to appoint a substitute. *Nelson*, 274 So.2d at 259. By this serious omission, the trial court never reached an inquiry as to whether Mr. Gamble understood that he had the right to represent himself.

Nor was any inquiry made as to whether Mr. Gamble could

represent himself by making a "knowingly and intelligently" waiver of appointed counsel under the dictates of *Faretta v. California*, 422 U.S. 806 (1975). In fact, the record seems clear that Mr. Gamble, through no fault of his own, did not know about or understand his right to represent himself.

Mr. Gamble's trial counsel was certainly ineffective for not informing or advising him of such. The trial court erred in not carrying the *Nelson* discussion far enough so that a proper ruling on the conflict representation matter could be made. And, clearly, the failure to raise this matter on direct appeal shows the ineffective assistance of appellate counsel. Had this Court reviewed this issue on direct appeal, Mr. Gamble would have received a new trial so that the trial court could properly address the conflict waiver issue under the requirements of *Nelson* and *Faretta, supra*.

The matter was taken up by the trial court apparently as a side issue to others previously scheduled for hearing. The record is not clear as to how the court knew the matter was before it for consideration. The record does reflect that the following dialogue and exchange took place among the parties:

THE COURT: Before we get started on all the motions, I count some seventeen odd motions filed by Mr. Gamble. I think the Clerk indicates there may be more. Before we get started on that, I think there's an issue

that needs to be addressed regarding the continued representing of the defendant, Mr. Gamble, by Mr. Nacke, and in particular, the Public Defender's Office; is that correct, Mr. Nacke?

MR. NACKE: Yes, that's, your Honor. Basically I know the Court is aware of the situation. Our office and myself was instructed to go to my client with a Consent and Waiver Form to ask him to consent and waive a potential conflict because of a relationship between Michael Johnson and Michelle Morley. Michael Johnson being the Chief Assistant Public Defender of the Fifth Judicial Circuit in our office and Michelle Morley being one of the attorneys representing Mike Love.

Based on that and also the fact that Susan Graves who is employed as an Assistant Public Defender in the office of the Fifth Judicial Circuit, the Public Defender's Office, is the wife of Michael Graves who is counsel for co-Defendant Michael Love.

We were asked to notified [sic] Mr. Gamble of that situation, those situations and to ask him to sign a consent for us to continue representing him and to waive any potential conflict those relationships may create.

It has been our position from the outset of this request that, that there was no conflict, that there was no ethical duty for us to obtain this consent or waiver, and we've, we've maintained all along, that there is no conflict and that we had no duty, you know, whatsoever to go to the client with any "consent or waiver" of a potential conflict. There is no conflict. The potential itself is, is not a conflict or not an ethical violation. There is no conflict it's been our position all along.

As instructed I went, I drafted a Consent and Waiver Form for Mr. Gamble to sign, took it over to him, and he had many reservations. He considered it for a couple of days, and he indicated to me that he did not want to sign it; that, you know, that has caused him to distrust me as his attorney and the office of the Public Defender's Office in representing him.

He told me that he wanted to have substitute counsel, did not want us to represent him anymore. I will let him, you know, make that motion himself, your Honor.

(R. 1871-73) (emphasis added).

The trial court subsequently made inquiry of Mr. Gamble as follows:

THE COURT: [M]r. Gamble.

DEFENDANT GAMBLE: At this time, your Honor, it's not so much that I distrust Mark as he said, I just feel that they brought me this potential conflict and I didn't - I don't see a problem with it but there, you know, I don't understand why it was brought to me if it wasn't a conflict, if it wasn't an ethical problem, you know. I didn't know about it beforehand, so, you know, I have a problem with signing it if, you know, if you can see fit to substitute counsel, you know.

THE COURT: Do you know of anything that your attorney has done that is inappropriate or improper on, on your behalf in representing you?

DEFENDANT GAMBLE: Well, not anything that I could substantiate with law, you know. I've been to the law library here in Lake County and there's nothing that says that he's done anything legally or ethically wrong but ...

THE COURT: Do you know of any improper exchange of confidential or privileged information by your attorney with anybody else in this case?

DEFENDANT GAMBLE: No, I don't.

THE COURT: Is there any hint that that might have happened as far as you're concerned?

DEFENDANT GAMBLE: Not - No, there's no hint that there was but I just, you know, *all I can say is there's a potential of, you know, a relationship between the persons, you know, the situation things could be said at moments that, you know, normally wouldn't leave those two people but in the circumstances.*

THE COURT: Okay. Anything else, sir?

DEFENDANT GAMBLE: No.

THE COURT: Okay. Thank you.

(R. 1873-75) (emphasis added).

The court thereafter made inquiry under oath of defense counsel Nacke (R. 1875-76), Michael Love's counsel Michael Graves (R. 1876-78; 1882-83), Chief Assistant Public Defender Michael Johnson (R. 1878-81), Michael Love's counsel Michelle Morley (R. 1881-82) and Assistant Public Defender Hugh Lee (assigned as a paralegal on the case pending the termination of his Florida Bar suspension)(R. 1884-86). Each denied knowing of any improper or inappropriate exchanges of information among the attorneys or of any other reason for ending the Public

Defender's representation of Mr. Gamble. The court found and ruled that "I find at this time that there are no grounds for removal of your attorney, Mr. Gamble, and there is no evidence to support that and there's no grounds to appoint another counsel in this case." (R. 1883).

This record is clear that Mr. Gamble had concerns about the potential conflict with the relationship among the attorneys for the two co-defendants and that he was requesting substitute counsel. The record is clear that the Public Defender's Office took the matter seriously enough to pursue a written waiver from Mr. Gamble and to have the issue decided by the court. The record is also clear that the trial judge failed to carry the inquiry far enough to see if Mr. Gamble wanted to represent himself or could do so under the circumstances.

As this Court has indicated:

We recognize that, when one such as appellant attempts to dismiss his court-appointed counsel, it is presumed that he is exercising his right to self-representation. *Jones v. State*, 449 So.2d 253, 258 (Fla.), *cert.denied*, 469 U.S. 893, 105 S.Ct. 269. 83 L.Ed.2d 205 (1984). However, it nevertheless is incumbent upon the court to determine whether the accused is knowingly and intelligently waiving his right to court-appointed counsel, and the court commits reversible error if it fails to do so. *Faretta [v. California]*, 422 U.S. at 835, 95 S.Ct. At 2541; *Smith v. State*, 444 So.2d 542 (Fla. 1st DCA 1984). This is

particularly true where, as here, the accused indicates that his actual desire is to obtain different court-appointed counsel, which is not his constitutional right. *Donald v. State*, 166 So.2d 453 (Fla. 2d DCA 1964).

Hardwick v. State, 521 So.2d at 1074 (emphasis in original).

Here, reversible error was committed because the trial court never made the proper inquiry to determine whether Mr. Gamble knew he still had the right to dismiss his court-appointed counsel despite the court's finding of no conflict. Nor was any inquiry thereafter made to determine whether Mr. Gamble would be making a knowing and intelligent waiver of his right to court-appointed counsel.

Appellant counsel, consequently, was ineffective by failing to address this issue on direct appeal. This conclusion is inescapable because the omission was of "such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance" and, secondly, because the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." *Groover v. Singletary*, 656 So. 2d 424, 425 (Fla. 1995) (quoting *Pope v. Wainwright*, 496 So. 2d 798, 800 (Fla. 1986); see, e.g., *Teffeteller v. Dugger*, 734 So. 2d 1009, 1027 (Fla. 1999).

Habeas relief should therefore be granted.

ARGUMENT II

UNDER *APPRENDI* AND *RING* THE FLORIDA DEATH SENTENCING STATUTES AS APPLIED ARE UNCONSTITUTIONAL UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

In *Jones v. United States*, the United States Supreme Court held "under the Due Process Clause of the Fifth Amendment and the notice and jury 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 v. United States*, 526 U.S. 227, 243, n.6 (1999). Subsequently, in *Apprendi v. New Jersey*, the Court held that the Fourteenth Amendment affords citizens the same protections under state law. *Apprendi*, 120 S.Ct. 2348, 2355 (2000).

In *Apprendi*, the issue was whether a New Jersey hate crime sentencing enhancement, which increased the punishment beyond the statutory maximum, operated as an element of an offense so as to require a jury determination beyond a reasonable doubt. *Apprendi*, 120 S.Ct. at 2365. "[T]he relevant inquiry here is not one of form, but of effect-does the required finding expose the defendant to a greater punishment than that authorized by

the jury's guilty verdict?" *Apprendi*, 120 S.Ct. at 2365. Applying this test, it is clear that aggravators under the Florida death penalty sentencing scheme are elements of the offense which must be charged in an indictment, submitted to a jury during guilt phase, and proven beyond a reasonable doubt by a unanimous verdict.

At the time of Mr. Gamble's sentencing, Fla. Stat. § 775.082 provided:

A person who has been convicted of a capital felony **shall be punished by life imprisonment** and shall be required to serve no less than 25 years before becoming eligible for parole **unless the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.**

Fla. Stat. § 775.082 (1987) (emphasis added).

Under this statute, the state must prove at least one aggravating factor in the separate penalty phase proceeding before a person convicted of first degree murder is eligible for the death penalty. *State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973); Fla. Stat. § 775.082 (1994), § 921.141(2)(a), and § 921.141(3)(a)(1994). Thus, Florida capital defendants are not eligible for the death sentence simply upon conviction of first degree murder. If a court sentenced a defendant immediately

after conviction, the court could only impose a life sentence. Fla. Stat. § 775.082 (1994). Therefore, under Florida law, the death sentence is not within the statutory maximum sentence, as analyzed in *Apprendi*, because it increased the penalty for first degree murder beyond the life sentence a defendant is eligible for based solely upon the jury's guilty verdict.

Under the Florida death penalty scheme there are essentially two levels of first degree murder. The first, conviction for first degree premeditated murder or felony murder permits a life sentence. The second, if aggravating circumstances are proved beyond a reasonable doubt, the person so convicted can be sentenced to death. Thus, the Florida death penalty system divides murders into two categories, analogous to felony battery and aggravated battery. Felony battery, which is punished as a third degree felony, becomes aggravated battery, punished as a second degree felony, upon proof of certain aggravating circumstances. Fla. Stat. §§ 784.041, 784.045 (1999). These circumstances which increase felony battery from a third degree felony to a second degree felony of aggravated battery are elements of the crime which must be charged in the indictment, submitted to the jury, and must be proved beyond a reasonable doubt by a unanimous verdict.

Likewise, the Florida death penalty aggravating

circumstances, which elevate a murder punishable by a life sentence to a murder punishable by death, must be charged in the indictment, submitted to the jury, and must be proved beyond a reasonable doubt. No other crimes in Florida allow increased punishments based on additional findings (other than prior conviction) made by a judge; *Apprendi* disallows this practice.

In *Apprendi*, the hate crime sentencing enhancement was applied after the defendant was found guilty and increased the statutory maximum penalty by up to ten years. *Apprendi*, 120 S.Ct. at 2351. The *Apprendi* court clearly dispensed with the fiction that such an enhancement was not an element which received Sixth Amendment protections. The Court wrote “[b]ut it can hardly be said that the potential doubling of one’s sentence from 10 years to 20 has no more than a nominal effect. Both in terms of absolute years behind bars, and because of the severe stigma attached, the differential here is unquestionably of constitutional significance.” *Apprendi*, 120 S.Ct. at 2365. As in *Apprendi*, in Mr. Gamble’s case, the aggravators were applied only after he was found guilty. The aggravators increased the statutory maximum penalty based on 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. “[T]he penalty of death is qualitatively

different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1975). See *Gardner v. Florida*, 430 U.S. 349, 357 (1976).

Though *Apprendi* involved two separate statutes and the Florida death penalty involves only one, the issue is substance over form. *Apprendi* 120 S.Ct. at 2350, 2365; Fla. Stat. § 921.141 (1999). The effect of the Florida death penalty statute is similar to the effect of the federal car jacking statute the United States Supreme Court addressed in *Jones v. United States*, 526 U.S. 227, 243, n.6 (1999). Three subsections of the *Jones* statute appeared, superficially, to be sentencing factors. However, the superficial impression lost clarity when the Court examined the effects of the sentencing factors.

But the superficial impression loses clarity when one looks at the penalty subsections (2) and (3). These not only provide for steeply higher penalties, but they condition them on further acts (injury, death) that seem quite as important as the elements in the principle paragraph (e.g. force and violence, intimidation). It is at best questionable whether the specification of facts sufficient to increase a penalty range from 15 years to life, was meant to carry none of the process safeguards that elements of the offense bring with them for a defendant's benefit.

Jones, 526 U.S. at 233. Because the car jacking sentencing factors increased the maximum penalty for the crime from 15 years to 25 years or life imprisonment, the Court interpreted them as elements of the crime which receive Sixth Amendment protection. *Jones*, 526 U.S. at 230, 242-43.

Although the majority of the Court stated in dicta that *Apprendi* did not overrule *Walton v. Arizona*, 497 U.S. 639 (1990), the *Apprendi* court was not addressing a death case in which constitutional protections are more rigorously applied, and *Apprendi* did not specifically address the Florida sentencing scheme. *Apprendi*, 120 S.Ct. at 2366. Moreover, the majority dicta did not carry the force of an opinion of the full court. See *Apprendi*, 120 S.Ct. at 2380 (Thomas J., concurring) ("Whether this distinction between capital crimes and all others, or some other distinction, is sufficient to put the former outside the rule that I have stated is a question for another day."); *Apprendi*, 120 S.Ct. at 2387-88 (O'Connor, J., dissenting) ("If the Court does not intend to overrule *Walton*, one would be hard pressed to tell from the opinion it issues today.") *Apprendi*, 120 S.Ct. 2388.

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*, at 2365. This did not occur in Mr. Gamble's case. Thus, the Florida death penalty scheme is unconstitutional as applied.

Mr. Gamble recognizes that this Court has consistently rejected similar claims within the past year. See *King v. State*, 27 Fla.L.Weekly S65 (Fla. Jan. 16, 2002), stay granted, No. 01-7804 (U.S. Jan. 23, 2002); *Mills v. Moore*, 786 So.2d 532, 536-537 (Fla. 2001), cert. denied 121 S.Ct. 1752 (2001); *Brown v. Moore*, 26 Fla.L.Weekly S742 (Fla. Nov. 1, 2001); and *Mann v. State*, 794 So.2d 596, 599 (Fla. 2001). On January 31, 2002, this Court denied the petitioner *Apprendi* relief in *Bottoson v. Moore*, ___ So.2d ___ (Fla. Jan. 31, 2002), in accordance with the ruling in *King*.

However, on June 24, 2002, the United States Supreme Court decided *Ring v. Arizona*, 122 S.Ct. 2428, ----, 2002 WL 1357257.

In *Ring*, the United States Supreme Court held that the Arizona statute violates the Sixth Amendment right to a jury trial in capital prosecutions because the trial judge, sitting alone and following a jury adjudication of a defendant's guilt of first-degree murder, determines the presence or absence of

the aggravating factors required by Arizona law for imposition of the death penalty; receding from *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511. If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact--no matter how the State labels it--must be found by a jury beyond a reasonable doubt. A defendant may not be exposed to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone. The court noted that the "right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished" if it encompassed the fact-finding necessary to increase a noncapital defendant's sentence by a term of years, as was the case in *Apprendi*, but not the fact-finding necessary to put him to death. *Ring v. Arizona*, 2002 WL 1357257 *10.

Florida's death penalty statutory scheme facially violates the federal Constitution. In Florida, death is not within the maximum penalty for a conviction of first degree murder:

A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, and in the latter

event such person shall be punished by death.

Fla. Stat. § 775.082 (1984). The statutory scheme does not permit a sentence greater than life predicated on the jury verdict alone. A penalty phase must then be conducted under § 921.141. While the jury gives a recommendation, it is the judge who makes the findings and imposes the sentence.

In *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), the United States Supreme Court recognized that for purposes of the Sixth Amendment, Florida's death penalty statute is indistinguishable from the statute invalidated in *Ring*:

We repeatedly have rejected constitutional challenges to Florida's death sentencing scheme, which provides for sentencing by the judge, not the jury. *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989) (*per curiam*); *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (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, 109 S.Ct., at 2056, 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, 109 S.Ct., at 2057.

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.

Id. 647-48. The Court reiterated this Sixth Amendment link between the Florida and Arizona capital sentencing schemes in *Ring*:

In *Walton v. Arizona*, 497 U.S. 639 (1990), we upheld Arizona's scheme against a charge that it violated the Sixth Amendment. The Court had previously denied a Sixth Amendment challenge to Florida's capital sentencing system, in which the jury recommends a sentence but makes no explicit findings on aggravating circumstances; we so ruled, *Walton* noted, on the ground that 'the Sixth Amendment does not require that specific findings authorizing the imposition of the sentence of death be made by the jury' *Id.* at 648 (quoting *Hildwin v. Florida*, 490 U.S. 638, 640-641 (1989) (*per curiam*)). *Walton* found unavailing attempts by the defendant-petitioner in that case to distinguish Florida's capital sentencing system from Arizona's. In neither State, according to *Walton*, were the aggravating factors 'elements of the offense'; in both States, they ranked as 'sentencing considerations' guiding the choice between life and death. 497 U.S. at 648 (internal quotation marks omitted).

Ring v. Arizona, 2002 WL 1357257 *9 (U.S.). The parallelism

between the Arizona statute and the Florida statute was the major *Walton* theme. *Walton, supra*, 497 U.S. at 640-641, 647.

In *Ring*, the State and its *amici* agreed that overruling *Walton* necessarily meant Florida's statute falls. See Brief of Respondent in *Ring* at 31, Tr. of Oral Arg. at 36, and Brief *Amicus Curiae* of Criminal Justice Legal Foundation at 21-22.

Notably, this Court has previously held that, "[b]ecause *Apprendi* did not overrule *Walton*, the basic scheme in Florida is not overruled either." *Mills v. Moore*, 786 So.2d 532, 537 (Fla. 2001). *Ring* overruled *Walton* and the basic principle of *Hildwin v. Florida*, 490 U.S. 638 (1989) (*per curiam*), which had upheld the capital sentencing scheme in Florida "on grounds that 'the Sixth Amendment does not require that the specific findings authorizing imposition of the sentence of death be made by the jury.'" *Ring*, slip op. at 11 (quoting *Walton*, 497 U.S. at 648, in turn quoting *Hildwin*, 490 U.S. at 640-641)).

Additionally, *Ring* undermines the reasoning of this Court's decision in *Mills* by recognizing (a) that *Apprendi* applies to capital sentencing schemes,¹ *Ring*, slip op. at 2 ("Capital

¹ In *Mills*, The Florida Supreme Court said that "the plain language of *Apprendi* indicates that the case is not intended to apply to capital [sentencing] schemes." *Mills*, 786 So.2d at 537. Such statements appear at least four times in *Mills*.

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"); *id.* at 23, (b) that States may not avoid the Sixth Amendment requirements of *Apprendi* by simply "specif[ying] 'death or life imprisonment' as the only sentencing options,"² *Ring*, slip op. at 17, and (c) that the relevant and dispositive question is whether under state law death is "authorized by a guilty verdict standing alone." *Ring*, slip op. at 19.

Under Florida law, the court conducts a separate sentencing proceeding after which the jury renders an advisory verdict. Fla. Stat. § 921.141. The ultimate decision to impose a sentence of death, however, is made by the court after finding at least one aggravating circumstance. The jury recommends a sentence but makes no explicit findings on aggravating circumstances. The statute is explicit that, without these required findings of fact by the trial judge, the defendant must be sentenced to life imprisonment: "If the court does not make the findings requiring the death sentence within 30 days after the rendition of the

² *Mills* reasoned that because first-degree murder is a "capital felony," and the dictionary defines such a felony as "punishable by death," the finding of an aggravating circumstance did not expose the petitioner to punishment in excess of the statutory maximum. *Mills*, 786 So.2d at 538.

judgment and sentence, the court shall impose [a] sentence of life imprisonment."

Because the Florida death penalty statutory scheme thus requires fact-finding by the trial judge before a death sentence may be imposed, it is unconstitutional under the holding and rationale of *Ring*.

This Court has previously rejected the idea that a defendant convicted of first degree murder has the right "to have the existence and validity of aggravating circumstances determined as they were placed before his jury." *Engle v. State*, 438 So.2d 803, 813 (Fla. 1983), explained in *Davis v. State*, 703 So.2d 1055, 1061 (Fla. 1997). The statute specifically requires the judge to "set forth . . . findings upon which the sentence of death is based as to the *facts*," but asks the jury generally to "render an advisory sentence . . . based upon the following *matters*" referring to the sufficiency of the aggravating and mitigating circumstances. Fla. Stat. §§ 921.141(2) & (3) (emphasis added). Because Florida law does not require that any number of jurors agree that the State has proven the existence of a given aggravating circumstance before it may be deemed "found," it is impossible to say that "the jury" found proof beyond a reasonable doubt of a particular aggravating circumstance. Thus, "the sentencing order is 'a statutorily

required personal evaluation by the trial judge of the aggravating and mitigating factors' *that forms the basis of a sentence of life or death.*" *Morton v. State*, 789 So.2d 324, 333 (Fla. 2001) [quoting *Patton v. State*, 784 So.2d 380 (Fla. 2000)].

As the Supreme Court said in *Walton*, "[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." *Walton*, 497 U.S. at 648. This Court has made the point even more strongly by repeatedly emphasizing that the trial judge's findings must be made independently of the jury's recommendation. See *Grossman v. State*, 525 So.2d 833, 840 (Fla. 1988) (collecting cases). Because the judge must find that "sufficient aggravating circumstances exist" "notwithstanding the recommendation of a majority of the jury," Fla. Stat. § 921.141(3), the judge may consider and rely upon evidence not submitted to the jury. *Porter v. State*, 400 So.2d 5 (Fla. 1981); *Davis v. State*, 703 So.2d 1055, 1061 (Fla. 1997). The judge is also permitted to consider and rely upon aggravating circumstances that were not submitted to the jury. *Davis*, 703 So.2d at 1061, citing *Hoffman v. State*, 474 So.2d 1178 (Fla. 1985) (court's finding of "heinous, atrocious, or cruel"

aggravating circumstance proper though jury was not instructed on it); *Fitzpatrick v. State*, 437 So.2d 1072, 1078 (Fla. 1983) (finding of previous conviction of violent felony was proper even though jury was not instructed on it); *Engle, supra*, 438 So.2d at 813.

Although "[Florida's] enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,'" and therefore must be found by a jury like any other element of an offense, *Ring*, slip op. at 23 (quoting *Apprendi*, 530 U.S. at 494), Florida law does not require the jury to reach a verdict on any of the factual determinations required before a death sentence could be imposed. Section 921.141(2) does not call for a jury verdict, but rather an "advisory sentence." This Court has made it clear that "the jury's sentencing recommendation in a capital case is *only advisory*. The trial court is to conduct its own weighing of the aggravating and mitigating circumstances" *Combs*, 525 So.2d at 858 (quoting *Spaziano v. Florida*, 468 U.S. 447, 451) (emphasis original in *Combs*). "The trial judge . . . is not bound by the jury's recommendation, and is given final authority to determine the appropriate sentence." *Engle*, 438 So.2d at 813.

Because Florida law does not require any two, much less twelve, jurors to agree that the government has proved an

aggravating circumstance beyond a reasonable doubt, or to agree on the same aggravating circumstances when advising that "sufficient aggravating circumstances exist" to recommend a death sentence, there is no way to say that "the jury" rendered a verdict as to an aggravating circumstance or the sufficiency of them. As Justice Shaw observed in *Combs*, Florida law leaves these matters to speculation. *Combs*, 525 So.2d at 859 (Shaw, J., concurring).

In Florida, additionally, the advisory verdict is not based on proof beyond a reasonable doubt. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact - no matter how the State labels it - must be found by a jury beyond a reasonable doubt." *Ring*, slip op. at 16. One of the elements that had to be established for Mr. Gamble to be sentenced to death was that "sufficient aggravating circumstances exist" to call for a death sentence. Fla. Stat. § 921.141(3).³ The jury was not instructed that it had to find this element proved beyond a reasonable doubt. In fact, it was not instructed on any standard by which

³ It is important to note that although Florida law requires the judge to find that sufficient aggravating circumstances exist to form the basis for a death sentence, Fla. Stat. § 921.141(3), it only asks the jury to say whether sufficient aggravating circumstances exist to "recommend" a death sentence. Fla. Stat. § 921.141(2).

to make this essential determination.

Furthermore, a unanimous twelve member jury verdict is required in capital cases under United States Constitutional common law.⁴ Florida's capital sentencing statute is, therefore, unconstitutional on its face and as applied.⁵

"[T]o guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties," 2 J. Story, *Commentaries on the Constitution of the United States* 540-541 (4th ed. 1873), trial by jury has been understood to require that "*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours...." 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769) (cited in *Apprendi*, by its terms a noncapital case).

⁴ In *Cabberiza v. Moore*, 217 F.3d 1329 (C.A.11 Fla., 2000) the court noted that the United States Supreme Court "has not had occasion to decide how many jurors, and what degree of unanimity, the Sixth and Fourteenth Amendments require in capital cases." *Id.* n.15. *Duncan v. Louisiana*, 391 U.S. 145 (1968), and *Apodaca v. Oregon*, 406 U.S. 404 (1972) were noncapital cases. Both cases cite in their first footnotes the applicable state constitutional provisions, which require twelve person unanimous juries in capital cases.

⁵ The sentencing recommendation in this case was 10 - 2 for death and was, therefore, not unanimous.

It would be impermissible and unconstitutional to rely on the jury's advisory sentence as the basis for the fact-findings required for a death sentence because the statute requires only a majority vote of the jury in support of that advisory sentence. In *Harris v. United States*, 2002 WL 1357277, No. 00-10666 (U.S. June 24, 2002), rendered on the same day as *Ring*, the United States Supreme Court held that under the *Apprendi* test "those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis." *Id.* at *14. And in *Ring*, the Court held that the aggravating factors enumerated under Arizona law operated as "the functional equivalent of an element of a greater offense" and thus had to be found by a jury. In other words, pursuant to the reasoning set forth in *Apprendi*, *Jones*, and *Ring*, aggravating factors are equivalent to elements of the capital crime itself and must be treated as such.

In *Williams v. Florida*, 399 U.S. 78, at 103 (1970), the United States Supreme Court noted that: "In capital cases, for example, it appears that no state provides for less than 12 jurors—a fact that suggests implicit recognition of the value of the larger body as a means of legitimizing society's decision to impose the death penalty." Each of the thirty-eight states that

use the death penalty require unanimous twelve person jury convictions.⁶ In its 1979 decision reversing a non-unanimous six person jury verdict in a non-capital case, the United States Supreme Court held that "We think this near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not." *Burch v. Louisiana*, 441 U.S. 130, 138 (1979). The federal government requires unanimous twelve person jury verdicts. "[T]he jury's decision upon both guilt and whether the punishment of death should be imposed must be unanimous. This construction is more consonant with the general humanitarian purpose of the Anglo-American jury system." *Andres v. United States*, 333 U.S. 740, 749 (1948). S e e

⁶ Ala.R.Cr.P 18.1; Ariz. Const. Art 2, s.23; Ark. Code Ann. §16-32-202; Cal. Const. Art. 1, §16; Colo. Const. Art 2, §23; Conn. St. 54-82(c), Conn.R.Super.Ct.C.R. §42-29; Del. Const. Art. 1, §4; Fla. Stat. Ann. § 913.10(1); Ga. Const. Art. 1, §1, P XI; Idaho. Const. Art. 1, §7; Ill. Const. Art. 1, §13; Ind. Const. Art. 1, §13; Kan. Const. Bill of Rights §5; Ky. Const. §7, Admin.Pro.Ct.Jus. A.P. 11 §27; La. C.Cr.P. Art. 782; Md. Const. Declaration Of Rights, Art. 5 ; Miss. Const. Art. 3, §31; Mo. Const. Art. 1, §22a; Mont. Const. Art. 2, §26; Neb. Rev. St. Const. Art. 1, §6; Nev. Rev. Stat. Const. Art. 1, §3; N.H. Const. PH, Art. 16; N.J. Stat. Ann. Const. Art. 1, p. 9; N.M. Const. Art. 1 §12; N.Y. Const. Art. 1, §2; N.C. Gen. Stat. Ann. §15A-1201; Ohio Const. Art. 1, §5; Okla. Const. Art. 2, §19; Or. Const. Art. 1, §11, Or. Rev. Stat. §136.210; Pa. Stat. Ann. 42 Pa.C.S.A. §5104; S.C. Const. Art. V, §22; S.D. ST §23A-267; Tenn. Const. Art.1, §6; Tex. Const. Art.1, §5; Utah Const. Art. 1 §10; Va. Const. Art. 1, §8; Wash. Const. Art. 1, §21; Wyo. Const. Art. 1, §9.

generally Richard A. Primus, *When Democracy Is Not Self-Government: Toward a Defense of The Unanimity Rule For Criminal Juries*, 18 Cardozo L. Rev. 1417 (1997).

Ring also held that the existence of at least one statutory aggravating circumstance must be proven to a jury beyond a reasonable doubt. In essence, the aggravating circumstance is an essential element of a new crime that might be called "aggravated" or "death-eligible" first degree murder. The death recommendation in this case was not unanimous.

Florida requires that verdicts be unanimous.⁷ Although Florida's constitutional guarantee of a jury trial [Art. I, §§ 16, 22, Fla. Const.] has never been interpreted to require a unanimous jury verdict, it has long been the legal practice of this state to require such unanimity in all criminal jury trials; Fla.R.Crim.P. 3.440 memorializes this long-standing practice: "[n]o [jury] verdict may be rendered unless all of the trial jurors concur in it." It is therefore settled that "[i]n this state, the verdict of the jury must be unanimous" and that any interference with this right denies the defendant a fair trial. *Jones v. State*, 92 So.2d 261 (Fla.1956).

⁷ At least absent a waiver initiated by the defendant. *Flanning v. State*, 597 So.2d 864 (Fla. 3d DCA 1992). See *Nobles v. State*, 786 So.2d 56, (Fla. 4th DCA 2001) certifying question. *Flanning* is flatly inconsistent with *Jones*.

Another point from *Ring* is that the harmless error doctrine cannot be applied to deny relief. As Justice Scalia explained in *Sullivan v. Louisiana*, 508 U.S. 275 (1993): “[T]he jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.” *Sullivan*, 508 U.S. at 278. Where the jury has not been instructed on the reasonable doubt standard,

[t]here has been no jury verdict within the meaning of the Sixth Amendment, [and] the entire premise of *Chapman*⁸ review is simply absent. There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would be rendered absent the constitutional error is utterly meaningless. There is no *object*, so to speak, upon which harmless-error scrutiny can operate.

Sullivan, 508 U.S. at 280. The same reasoning applies to lack of unanimity, failure to instruct the jury properly, and importantly, the lack of an actual verdict.

Mr. Gamble’s death sentence also violates the State and Federal Constitutions because the elements of the offense necessary to establish capital murder were not charged in the indictment. *Jones v. United States*, 526 U.S. 227 (1999), held that “under the Due Process Clause of the Fifth Amendment and

⁸ *Chapman v. California*, 386 U.S. 18 (1967).

the notice and jury 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*, at 243, n.6. *Apprendi v. New Jersey*, 530 U.S. 466 (2000), held that the Fourteenth Amendment affords citizens the same protections when they are prosecuted under state law. *Apprendi*, 530 U.S. at 475-476.⁹ *Ring* held that a death penalty statute's "aggravating factors operate as 'the functional equivalent of an element or a greater offense.'" *Ring*, quoting *Apprendi* at 494, n. 19. In *Jones*, the Supreme Court noted that "[m]uch turns on the determination that a fact is an element of an offense, rather than a sentencing consideration," because "elements must be charged in the indictment." *Jones*, 526 U.S. at 232.

Like the Fifth Amendment to the United States Constitution, Article I, section 15 of the Florida Constitution provides that "No person shall be tried for a capital crime without presentment or indictment by a grand jury." Florida law clearly requires every "element of the offense" to be alleged in the information or indictment. In *State v. Dye*, 346 So. 2d 538, 541 (Fla. 1977), this Court said "[a]n information must allege each

⁹ The grand jury clause of the Fifth Amendment has not been held to apply to the States. *Apprendi*, 530 U.S. at 477, n.3.

of the essential elements of a crime to be valid. No essential element should be left to inference." In *State v. Gray*, 435 So. 2d 816, 818 (Fla. 1983), this Court said "[w]here an indictment or information wholly omits to allege one or more of the essential elements of the crime, it fails to charge a crime under the laws of the state." An indictment in violation of this rule cannot support a conviction; the conviction can be attacked at any stage, including "by habeas corpus." *Gray*, 435 So.2d at 818. Finally, in *Chicone v. State*, 684 So. 2d 736, 744 (Fla. 1996), this Court said "[a]s a general rule, an information must allege each of the essential elements of a crime to be valid."

The Sixth Amendment requires that "[i]n all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation" A conviction on a charge not made by the indictment is a denial of due process of law. *State v. Gray*, *supra*, citing *Thornhill v. Alabama*, 310 U.S. 88 (1940), and *De Jonge v. Oregon*, 299 U.S. 353 (1937).

Because the State did not submit to the grand jury, and the indictment did not state, the essential elements of the aggravated crime of capital murder, Mr. Gamble's right under Article I, section 15 of the Florida Constitution, and the Sixth Amendment to the federal Constitution were violated. By wholly

omitting any reference to the aggravating circumstances that would be relied upon by the State in seeking a death sentence, the indictment prejudicially hindered Mr. Gamble "in the preparation of a defense" to a sentence of death. Fla.R.Crim.P. 3.140(o).

Lastly, the Petitioner, Mr. Gamble, is entitled to the benefit of *Apprendi* and *Ring* under *Witt v. State*, 387 So.2d 922, 929-930 (Fla. 1980).

ARGUMENT III

APPELLATE COUNSEL FOR MR. GAMBLE WAS INEFFECTIVE FOR FAILING TO RAISE ON DIRECT APPEAL THE ISSUE THAT TRIAL COUNSEL'S SEVERANCE DECISION PREVENTED THE JURY FROM LEARNING OF THE CO-DEFENDANT'S CULPABILITY AND DISPARATE SENTENCE. THIS ARGUMENT IS PRESENTED PURSUANT TO THE DICTATES OF *SIRECI V. STATE*, 773 SO.2d 34, 41 (FN 14)(FLA. 2000) TO PRESERVE THE ISSUE FOR REVIEW.

On the direct appeal, appellate counsel properly presented the issue concerning the life sentence that the co-defendant, Michael Love, received following a plea bargain with the State. (IB. 31). Love made his plea bargain and was sentenced after Mr. Gamble's penalty phase but before Mr. Gamble himself was sentenced in this case. Appellate counsel cited *Messer v. State*, 403 So.2d 341 (Fla. 1981) as his sole authority for arguing that Mr. Gamble would have been entitled, under normal circumstances, to present the co-defendant's sentence to the

penalty phase jury. As to mitigation in Mr. Gamble's case, the trial court gave some weight to the disparate sentence of the co-defendant, having the matter formally brought to his attention through the trial counsel's Memorandum in Support of Life Sentence. (R. 477-82). This Court disagreed with the proposition that the disparate sentence of the co-defendant "singlehandedly" required a sentence reduction for Mr. Gamble. *Gamble*, 659 So.2d at 245.

In the direct appeal, appellate counsel solely argued that the co-defendant's degree of participation in the prosecuted crimes made it possible, if not probable, that the penalty phase jury would have recommended life for Mr. Gamble. This Court "refuse[d] to speculate as to what may have occurred had the Gamble jury been made aware of the posture of Love's case." *Gamble*, 659 So.2d at 245. What appellate counsel failed to present, in addition to Love's "degree of participation" as a factor and, therefore, culpability, in the crimes charged and tried, was Love's criminal background. In fact, trial counsel insisted on a severance of Mr. Gamble's trial from that of Michael Love's (see Motion to Sever Defendants, R. 77-8) despite the fact that the State elected not to introduce Love's statements to law enforcement at Mr. Gamble's trial (see State's Motion for Rehearing, R. 200-02). Had trial counsel not pressed

for severance, trial counsel likewise could have used Love's disparate criminal background to his advantage in strengthening his argument to the jury and court that Love was the more culpable defendant. These factors would have enhanced the argument of Mr. Gamble's trial counsel that the robbery and murder of the victim was by Love's design, not that of Mr. Gamble's. As trial counsel testified at the evidentiary hearing, this aspect of the defense, that "[w]e argued that it was not Guy Gamble's plan that was carried out, therefore Guy Gamble did not intend to rob at that time" (PC-R. 2418) was the key to the guilt phase of the trial.

Appellant counsel, consequently, was ineffective by failing to address this issue on direct appeal. This conclusion is inescapable because the omission was of "such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance" and, secondly, because the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." *Groover v. Singletary*, 656 So. 2d 424, 425 (Fla. 1995) (quoting *Pope v. Wainwright*, 496 So. 2d 798, 800 (Fla. 1986); see, e.g., *Teffeteller v. Dugger*, 734 So. 2d 1009, 1027 (Fla. 1999). Habeas relief should therefore be granted.

ARGUMENT IV

**MR. GAMBLE'S EIGHTH AMENDMENT RIGHT AGAINST
CRUEL AND UNUSUAL PUNISHMENT WILL BE
VIOLATED AS HE MAY BE INCOMPETENT AT TIME OF
EXECUTION.**

In accordance with Florida Rules of Criminal Procedure 3.811 and 3.812, a prisoner cannot be executed if "the person lacks the mental capacity to understand the fact of the impending death and the reason for it." This rule was enacted in response to *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595 (1986).

The undersigned acknowledges that under Florida law a claim of incompetency to be executed cannot be asserted until a death warrant has been issued. Further, the undersigned acknowledges that before a judicial review may be held in Florida, the defendant must first submit his claim in accordance with Florida Statutes. The only time a prisoner can legally raise the issue of his sanity to be executed is after the Governor issues a death warrant. Until the death warrant is signed, the issue is not ripe. This is established under Florida law pursuant to Fla. Stat. § 922.07 (1985) and *Martin v. Wainwright*, 497 So. 2d 872 (1986)(If Martin's counsel wish to pursue this claim, we direct them to initiate the sanity proceedings set out in section 922.07, Florida Statutes (1985).

The same holding exists under federal law. *Poland v.*

Stewart, 41 F.Supp.2d 1037 (D. Ariz. 1999)(such claims truly are not ripe unless a death warrant has been issued and an execution date is

pending); *Martinez-Villareal v. Stewart*, 118 S.Ct. 1618, 523 U.S. 637, 140 L.Ed.2d 849 (1998)(respondent's Ford claim was dismissed as premature, not because he had not exhausted state remedies, but because his execution was not imminent and therefore his competency to be executed could not be determined at that time); *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993) (the issue of sanity [for Ford claim] is properly considered in proximity to the execution).

However, most recently, in *In Re: Provenzano*, No. 00-13193 (11th Cir. June 21, 2000), the 11th Circuit Court of Appeals has stated:

Realizing that our decision in *In Re: Medina*, 109 F.3d 1556 (11th Cir. 1997), forecloses us from granting him authorization to file such a claim in a second or successive petition, Provenzano asks us to revisit that decision in light of the Supreme Court's subsequent decision in *Stewart v. Martinez-Villareal*, 118 S.Ct. 1618 (1998). Under our prior panel precedent rule, See *United States v. Steele*, 147 F.3d 1316, 1317-18 (11th Cir. 1998) (en banc), we are bound to follow the *Medina* decision. We would, of course, not only be authorized but also required to depart from *Medina* if an intervening Supreme Court decision actually overruled or conflicted with it.[citations omitted].

Stewart v. Martinez-Villareal does not conflict with *Medina's* holding that a competency to be executed claim not raised in the initial habeas petition is subject to the strictures of 28 U.S.C. Sec 2244(b)(2), and that such a claim cannot meet either of the exceptions set out in that provision.

Id. at pages 2-3 of opinion.

Federal law requires that, in order to preserve a competency to be executed claim, the claim must be raised in the initial petition for habeas corpus. Hence, the filing of this petition. In order to exhaust state court remedies, the claim is being filed at this time.

Prior to Mr. Gamble's penalty phase at trial Virginia Chapell, a nurse at the Lake County jail, was summoned to his cell. (R. 1641-42). Chapell encountered Mr. Gamble sitting on a table, crying and shaking uncontrollably. (R. 1643). Mr. Gamble, according to Chapell, indicated that he was contemplating suicide (R. 1644), was feeling self-destructive and that he was hearing voices including that of the victim (R. 1644-46). Dr. Lowell Cunningham, the jail's psychiatrist, subsequently increased anti-depressant medication based on his view that Mr. Gamble was suffering from clinical depression and exhibiting a schizo-affect disorder. (R. 1668-70).

Further, Mr. Gamble has been incarcerated since 1991. Statistics have shown that incarceration over a long period of

time will diminish an individual's mental capacity. Inasmuch as Petitioner may well be incompetent at the time of execution, his Eighth Amendment right against cruel and unusual punishment will be violated.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Guy Richard Gamble respectfully urges this Honorable Court to grant habeas relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus has been furnished by U.S. Mail, first class postage prepaid, to Kenneth Nunnelley, Assistant Attorney

General, Office of the Attorney General, 444 Seabreeze
Boulevard, Fifth Floor, Daytona Beach, Florida 32118-3951 and
Guy R. Gamble, DOC# 123096; Union Correctional Institution, 7819
NW 228th Street, Raiford, Florida 32026 on this _____ day of
August, 2002.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Petition for Writ of Habeas Corpus was generated in Courier New 12-point font pursuant to Fla.R.App.P. 9.210.

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