

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-900

JIMMIE LEE CONEY,

Petitioner,

v.

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

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

This petition for habeas corpus relief is being filed in order to address substantial claims of error under the fourth, fifth, sixth, eighth and fourteenth amendments to the United States Constitution, claims demonstrating that Mr. Coney was deprived of the effective assistance of counsel on direct appeal and that the proceedings that resulted in his conviction and death sentence violated fundamental constitutional guarantees. Citations to the Record on the Direct Appeal shall be as follows:

"R" -- record on direct appeal to this Court;

JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Fla. R. App. P. 9.100. This Court has original jurisdiction under Fla. R. App. P. 9.030(a)(3) and Article V, § 3(b)(9), Fla. Const. The Constitution of the State of Florida guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, § 13, Fla. Const.

REQUEST FOR ORAL ARGUMENT

Mr. Coney requests oral argument on this petition.

PROCEDURAL HISTORY

The Circuit Court of the Eleventh Judicial Circuit, Miami-Dade County, Florida, entered the judgments of convictions and sentences under consideration.

Mr. Coney was indicted on April 25, 1990 by the grand jury on two counts; first degree murder, on the alternate theories of felony murder and premeditated murder, and arson (R. 1-2).

After a jury trial, Mr. Coney was found guilty of first-degree murder and related offenses.

On March 10, 1992, the jury recommended a death sentence for the First Degree Murder conviction by a vote of seven (7) to five (5) after deliberating for twenty-four minutes (R. 2888).

The trial court imposed a death sentence for the First Degree Murder conviction on March 27, 1992, finding no statutory or non-statutory mitigation (R. 412-17).

Appellate counsel's initial brief was filed on April 2, 1993. It included the ten arguments noted below:

I.

THE TRIAL COURT ERRED IN DENYING THE DEFENSE REQUEST FOR A JURY INSTRUCTION ON WEIGHING EVIDENCE OF DYING DECLARATIONS, IN VIOLATION OF THE CONFRONTATION CLAUSES OF THE FLORIDA AND UNITED STATES CONSTITUTIONS.

II.

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE INTO EVIDENCE OVER DEFENSE OBJECTION STATEMENTS MADE BY THE DECEDENT CONCERNING HIS OPINION AS TO THE MOTIVE OF JIMMIE CONEY, IN VIOLATION OF THE CONFRONTATION CLAUSES OF THE FLORIDA AND UNITED STATES CONSTITUTIONS.

III.

JIMMIE CONEY'S INVOLUNTARY ABSENCE FROM A NUMBER OF CRITICAL STAGES OF THE TRIAL REQUIRES REVERSAL OF HIS JUDGMENTS OF CONVICTION AND SENTENCE OF DEATH AS HIS ABSENCE THWARTED THE FUNDAMENTAL FAIRNESS OF THE PROCEEDINGS, IN VIOLATION OF FLA.R.CRIM.P. 3.180 AND THE DUE PROCESS CLAUSES OF THE FLORIDA AND UNITED STATES CONSTITUTIONS.

IV.

THE TRIAL COURT ERRED IN RESTRICTING

DEFENSE COUNSEL'S QUESTIONING OF PROSPECTIVE JURORS, IN VIOLATION OF JIMMIE CONEY'S RIGHT TO A FAIR AND IMPARTIAL JURY GUARANTEED BY THE FLORIDA AND UNITED STATES CONSTITUTIONS.

V.

THE TRIAL COURT ERRED IN VARIOUS OTHER RULINGS MADE DURING THE COURSE OF THE TRIAL.

VI.

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO CALL THE MOTHER OF THE VICTIM OF JIMMIE CONEY'S PRIOR VIOLENT FELONY OFFENSES TO TESTIFY AT THE PENALTY PHASE CONCERNING THE HORRORS SHE EXPERIENCED WHEN SHE ARRIVED HOME TO FIND HER DAUGHTER AFTER SHE HAD BEEN BRUTALLY RAPED AND STRANGLER, IN VIOLATION OF THE DUE PROCESS CLAUSES OF THE FLORIDA AND UNITED STATES CONSTITUTIONS, AND THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

VII.

THE PROSECUTOR'S ARGUMENT TO THE JURY DURING THE PENALTY PHASE REPEATEDLY URGING THEM TO CONSIDER THE IMPACT AND MESSAGE THEIR SENTENCE RECOMMENDATION WOULD HAVE ON THE COMMUNITY WAS IMPROPER AND INFLAMMATORY AND CONSTITUTED A NONSTATUTORY AGGRAVATING FACTOR, IN VIOLATION OF FLORIDA LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

VIII.

JIMMIE CONEY'S SENTENCE OF DEATH IS UNCONSTITUTIONAL AND DISPROPORTIONAL TO THE LIFE SENTENCES OF SIMILARLY SITUATED DEFENDANTS CONVICTED OF MURDERS INVOLVING DOMESTIC DISPUTES, IN VIOLATION OF FLORIDA LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

IX.

THE TRIAL COURT ERRED IN IMPOSING THE DEATH PENALTY BASED ON THE AGGRAVATING CIRCUMSTANCE THAT THE DEFENDANT KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PERSONS, IN VIOLATION OF FLORIDA LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

X.

THE TRIAL COURT ERRED IN FAILING TO FIND AND WEIGH ANY NONSTATUTORY MITIGATING CIRCUMSTANCES WHERE THE UNCONTROVERTED EVIDENCE PRESENTED AT THE PENALTY PHASE ESTABLISHED A SUBSTANTIAL NUMBER OF VALID NONSTATUTORY MITIGATING CIRCUMSTANCES, IN VIOLATION OF FLORIDA LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

On direct appeal, this Court affirmed Mr. Coney's convictions and sentences. Coney v. State, 653 So. 2d

1009 (Fla. 1995), cert. denied, 116 S. Ct. 315 (1995).

Mr. Coney filed his final motion for post-conviction relief on August 5, 1999.

Following an evidentiary hearing in December 2000, the lower court entered an order on Mr. Coney's Amended Motion to Vacate Judgments of Conviction and Sentence on May 2, 2001. The order denied all of Mr. Coney's 3.850 guilt phase claims, but granted relief in the form of a new penalty phase based on ineffective assistance of counsel at the penalty phase at the 1992 trial (R. 1325-44). The State appealed, Mr. Coney cross-appealed, and Mr. Coney is today filing this petition along with his Answer/Cross-initial brief.

CLAIM I

APPELLATE COUNSEL FAILED TO RAISE ON APPEAL NUMEROUS ISSUES WHICH WARRANT REVERSAL THAT WERE PRESERVED BY OBJECTIONS ENTERED BY TRIAL COUNSEL AT THE 1992 TRIAL PROCEEDING.

A. INTRODUCTION

Mr. Coney had the constitutional right to the effective assistance of counsel for purposes of presenting his direct appeal to this Court. Strickland v. Washington, 466 U.S. 668 (1984). "A first appeal as of right [] is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." Evitts v. Lucey, 469 U.S. 387, 396 (1985). The Strickland test applies equally to ineffectiveness allegations of trial counsel and appellate counsel. See Orazio v. Dugger, 876 F. 2d 1508 (11th Cir. 1989). Further, this Court has held that "[h]abeas petitions are the proper vehicle to advance claims of ineffective assistance of appellate counsel." Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000).

Because the constitutional violations which occurred during Mr. Coney's resentencing were "obvious on the record" and "leaped out upon even a casual reading of transcript," it cannot be said that the "adversarial testing process worked in [Mr. Coney's] direct appeal." Matire v. Wainwright, 811 F. 2d 1430, 1438 (11th Cir. 1987). The lack of appellate advocacy on Mr. Coney's behalf is identical to the lack of advocacy present in other cases in which this Court has granted habeas corpus relief. Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985). Appellate counsel's failure to present the meritorious issues discussed in this petition demonstrates that his representation of Mr. Coney's involved "serious and substantial deficiencies." Fitzpatrick v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986). Individually and "cumulatively," Barclay v. Wainwright, 444 So. 2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So. 2d at 1165 (emphasis in original). In light of the serious

reversible error that appellate counsel never raised, there is more than a reasonable probability that the outcome of the appeal would have been different, and a new direct appeal must be ordered.

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

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

Jones v. Moore, WL746764 (Fla., July 5, 2001)(No. SC00-660). Mr. Coney need not establish his claim by a

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

B. RECORD OF TRIAL

Trial counsel Manny Casabielle made numerous objections at the pre-trial and trial proceedings in 1992 that were not carried forward on direct appeal by appellate counsel.

1. GRUESOME PHOTOGRAPHS

Trial counsel objected to the admission of two photos, State 33 and 34, an objection initially sustained by the trial court (R. 1332). The State later "linked up" the photos as relevant and the photos were admitted. Trial

counsel's also objected to the admission of photos of alleged blood stains on the floor near the cell where Southworth was burned when no evidence was presented to show that the picture was of blood or that the substance was in any way related to Southworth, the victim (R. 1337).

Thus, the prosecution was permitted to introduce into evidence numerous gruesome photographs that were inflammatory, cumulative, and prejudicial, and admitted solely to inflame the passion of the jurors based on impermissible factors. Numerous photographs of the deceased's body taken at the scene of the crime and during the autopsy were also introduced into evidence. Photographs of the victims in the prior offenses were also admitted prejudicially at the penalty phase.

The admission of these photographs allowed the state free rein in inflaming the passions of the jury. The probative value of these photographs was not only outweighed by their prejudice, but these photographs were cumulative to each other. Their graphic content was

further emphasized through the testimony of witnesses and stressed by the state in closing argument.

The prejudicial effect of the photographs undermined the reliability of Mr. Coney's conviction and death sentence. The photographs themselves did not independently establish any material part of the state's case nor were they necessary to corroborate a disputed fact. The trial court's error in admitting these photographs cannot be considered harmless beyond a reasonable doubt. Chapman v. California, 87 S. Ct. 824 (1967); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

Use of these gruesome photographs, which were cumulative, inflammatory, and appealed improperly to the jury's emotions, denied Mr. Coney a fair trial in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and to corollary provisions within the Florida Constitution. Relief is proper and should be granted.

To the extent that appellate counsel failed to adequately raise this issue, Mr. Coney was denied

effective assistance of counsel.

2. MCBEE'S EXPERT TESTIMONY

The State used testimony by inmate James Franklin Young at trial to establish that a liquid obtained by inmate Young from the Dade Correctional Institution auto body shop was transferred by inmate Young to Mr. Coney at Coney's request (R. 1829-63). The body shop was administered by Evangelista Torres, a contract employee who was fired after the death of Southworth and never located for deposition or testimony in Mr. Coney's trial.

During the Metro-Dade Police investigation of the homicide, Metro-Dade Detective Odio obtained a control sample of lacquer thinner from a 55 gallon drum in the DCI bodyshop (R. 1490-94). Vincent McBee, a lab technician with Metro-Dade Police, was called by the State at Mr. Coney's trial to testify as "an expert on arson evidence examination" (R. 1865-66).

On cross-examination, McBee admitted that his tests did not reveal the substance Toluene to be present in the

standard sample obtained by Detective Odio from the prison body shop, but McBee testified that Toluene was present in the three items of evidence secured from the crime scene (R. 1922). He further testified that the liquid used as the standard sample was **not** the source of "all compounds" that were found in the items of evidence (R. 1929). In other words, if the liquid that inmate Young claimed to have supplied to Coney from the bodyshop came from the 55 gallon drum, it had a different chemical composition than the chemical traces he analyzed of remnants of the substance that which was actually used to burn Southworth.

Over defense counsel's objection, the court allowed technician McBee's opinions about the lacquer thinner into evidence in spite of trial counsel Casabielle's argument that the testimony was "highly prejudicial and corroborates a convicted felon's testimony when there ia absolutely no connection between the chemical that was drawn by Detective Odio and the chemical allegedly used in this case" (R. 1871-72). Trial counsel's objection also

went to McBee being allowed to speculate by answering a hypothetical question about result of mixture of two cans, contents of one being unknown, but this objection was overruled (R. 1895-1908).

Trial counsel had also objected to the admission, based on the failure by the State to establish a proper predicate, of a shoe box (alleged to have been Mr. Coney's storage container within his shared cell with Hason Jones for the cans of flammables), several soda cans, and some posters found in the trash (R. 1373, 1382-88, 1392). Casabielle also objected to the admission of a lock and keys that fit room 120, the cell where Southworth was burned. which had allegedly been found in a nearby garbage can (R. 1401). Counsel also objected to the admission of whole wheat bread allegedly used to seal drink cans, an objection that was overruled by the trial court with Casabielle's subsequent motion for mistrial denied (R. 1407). All these items were then admitted over defense objection re: fungibility (R. 1413).

On direct appeal, appellate counsel raised only one

aspect of these issues, in relation to the trial court overruling trial counsel's motion to strike the opinion of Lt. Platteis, the Dade County Fire Department arson investigator (R. 1426). Platteis opined as to the connection between tissue paper that was found and the soda cans coming into evidence when the defense contended that Mr. Coney could not have had flammable liquids in his cell. Initial Brief at 68. ("It was very prejudicial to allow the arson investigator to give his official imprimatur to the state's theory that the top of the soda cans had been sealed with tissue paper"). However, appellate counsel **failed** to carry forward on appeal the denial of Casabielle's motion for a mistrial that had been based on the lower court's prior ruling against his objection that a proper predicate was not laid for the admission of composite State Exhibit 41 (six cans, a "butt" can, bags and posters) through witness Odio (R. 2096). He also failed to carry forward trial counsel's objection's to McBee's qualification as an expert and his speculative and unscientific testimony. This alleged

"scientific" testimony unfairly bolstered the testimony of the State's inmate witnesses, especially the testimony of inmate James Young who claimed to have provided Mr. Coney with the substance used to set Southworth afire, and the testimony of Hason Jones.

During direct examination by the State, inmate Hason Jones, Jimmie Coney's roommate at the time of the fire, testified that he saw Coney in the room they shared with a shoebox that contained 2 soda water cans inside some plastic bags (R. 2021). On cross, defense counsel asked Jones to identify the shoebox which was in evidence, and then asked him about the plastic bags, which the witness identified as "canteen bags" from the institution (R. 2041). After a sidebar and further questioning of Jones, the State agreed that no such bags had been entered into evidence (R. 2046). The state apparently lost the bags if they ever existed and as such failed to preserve evidence. Technician McBee testified that he did not analyze a plastic bag or the doorknob (R. 1880). No latent prints of value were processed by Vincent Chew, the

fingerprint examiner for Metro-Dade Police (R. 1952). He did attempt to process a plastic ziplock bag, but there was "insufficient ridge detail" to effect an identification" (R. 1952, 1961). The plastic bag was not submitted by the State into evidence. Several other items of evidence, including two polished metal doorknobs, a key and a plastic milk jug (used as a locking device on the cell doors) were not even submitted by the State for fingerprint analysis (R. 1964-66).

It was an unreasonable and prejudicial for appellate counsel to fail to carry forward trial counsel's objection to the testimony of technician McBee concerning the composition of the lacquer thinner sample. To the extent that appellate counsel failed to adequately raise these objections on appeal, Mr. Coney was denied effective assistance of appellate counsel.

3. OTHER OBJECTIONS TO TESTIMONY

There were numerous other testimonial objections by trial counsel that the lower court overruled but that appellate counsel negligently failed to carry forward on

appeal.

The State was allowed to ask an officer if he had ever seen Coney and Southworth "together" (R. 1802-04). The prejudice that accrued to Mr. Coney is better understood when this testimony is considered in the context of another defense objection that was overruled, concerning inmate Santerfeit's testimony that Patrick Southworth was Mr. Coney's "boy" or "punk", what he described as the more "submissive" partner in a prison homosexual relationship (R. 2227). Appellate counsel failed to carry forward these objection as part of his Claim 5.C., concerning "various other rulings" by the lower court.

Santerfeit testified at Mr. Coney's trial that the only injury he suffered during the fire when his roommate Patrick Southworth was fatally burned was an injury to an ankle sustained in jumping down from his top bunk (R. 2194). He also commented that he singed his hair (R. 2236). Santerfeit also testified that he believed that he was a suspect in the murder of Southworth (R. 2216). The lower court also allowed in over defense objection

Santerfeit's testimony that Mr. Coney had given him an "east unit look" that meant to him Mr. Coney was trying to communicate "You're going to get it!" (R. 2230-31).

A Defense objection was overruled by the trial court as to State's question to inmate witness Gregory Hoover about "bad things" that happened to him as a result of giving information, specifically losing his clerk job at DCI, losing gain time and being labelled a "snitch" (R. 2002-2008). By allowing this testimony, the lower court's ruling served to effectively bolster his testimony by showing he had not been rewarded for his testimony for the State put punished.

Daries "Chicken Wing" Barnes testified for the defense (R. 2135-2179). According to the State's theory of the case, he was the "new lover" of Patrick Southworth who took up with Southworth while Coney was away from the institution (R. 2016). He lived upstairs, but according to Santerfeit's testimony, Southworth sometimes gave Barnes the key to his room because he had trouble waking up in the morning due to the effect of his psychotropic

medication (R. 2217-18). In his testimony Barnes denied a sexual relationship with Southworth, but admitted that he and Coney had sharp words about Southworth after Coney returned to DCI (R. 2136, 2152). A proper defense objection that the State's questioning had gone "beyond the scope of direct" was overruled as to questions to inmate witness Barnes about the day before the attack on Southworth being "draw day", the day inmates have money on them for use in purchasing items at the prison canteen (R. 2162-63).

Trial counsel made a hearsay objection to testimony by Dr. Rehnky as to where the X-rays of Southworth were taken, but the objection was overruled (R. 2501). Failing to carry forward this objection harmed Mr. Coney's guilt phase case. Trial counsel was trying to show that Southworth was already intubated at the time Officer Huffman testified that Southworth made one of his dying declaration Statements to Huffman at the hospital.¹

¹In allowing the dying declarations into the trial below, the trial court made findings on the record

To the extent that appellate counsel failed to adequately raise these objections on appeal, Mr. Coney was denied effective assistance of appellate counsel.

C. PENALTY PHASE

1. FAILURE TO RAISE HAC JURY INSTRUCTION

Defense counsel objected to the heinous, atrocious or cruel (HAC) aggravating factor jury instruction below (R. 342, R. 2832). Appellate counsel failed to carry this objection forward on direct appeal.

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner, and juries receive unconstitutionally vague instructions on the aggravating circumstances. The statute setting out the aggravating circumstances is vague under the eighth and fourteenth amendments. The Supreme

concerning Huffman, that "also I believe at the prison medical facility, and , third, to Darrell Huffman, the security officer at D.C.I., who traveled with the victim to Jackson Hospital and the statement was made in the x-ray room about 6:30 a.m. I find that all of these statements fall within the dying declaration exception to the hearsay rule" (R. 957-61).

Court in Richmond v. Lewis explained:

The relevant Eighth Amendment law is well defined. First, a statutory aggravating factor is unconstitutionally vague if it fails to furnish principled guidance for the choice between death and a lesser penalty. Second, in a "weighing" State, where the aggravating and mitigating factors are balanced against each other, it is constitutional error for the sentencer to give weight to an unconstitutionally vague aggravating factor, even if other, valid aggravating factors obtain.

506 U.S. 40, 46-47 (1992). See also Maynard v. Cartwright, 486 U.S. 356 (1988); Godfrey v. Georgia; Espinosa v. Florida, 505 U.S. 1079 (1992). The failure by appellate counsel to carry trial counsel's objection to the HAC instruction forward on direct appeal was deficient performance. To the extent that appellate counsel failed to adequately raise this issue, Mr. Coney was denied effective assistance of counsel

2. GRUESOME PHOTOS

As at the guilt phase, trial counsel continued to object to gruesome photos being admitted. Several Southworth autopsy pictures were allowed before the jury

in spite of Casabielle's objections (R. 2664). He also objected to the admission of prior crimes evidence and photos from the prior violent felonies in 1965 and 1976 that the State argued as aggravating factors (R. 2665-66).

Trial counsel renewed his objection from guilt phase as to autopsy photos of Southworth, but lower court allowed the State to choose several photos because HAC was at issue (R. 2679-87).

The trial court's error in admitting these photographs cannot be considered harmless beyond a reasonable doubt. Chapman v. California, 87 S. Ct. 824 (1967); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

Use of these gruesome photographs, which were cumulative, inflammatory, and appealed improperly to the jury's emotions, denied Mr. Coney a fair trial in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and to corollary provisions within the Florida Constitution. Relief is proper and should be granted. To the extent that appellate counsel failed to adequately raise this

issue, Mr. Coney was denied effective assistance of counsel.

CLAIM II

**FAILURE TO RAISE ON ORIGINAL DIRECT
APPEAL OTHER RULINGS**

Appellate counsel also failed to raise on direct appeal other rulings which, alone or in combination, particularly with the other errors described in this petition, established that a new trial and/or a resentencing is warranted.

A. CONFLICT OF INTEREST PURSUANT TO CUYLER V. SULLIVAN

Appellate counsel negligently failed to raise on direct appeal an apparent conflict of interest issue between Mr. Coney and Mr. Casabielle. This is true despite appellate counsel's Argument III in the appellate brief that Mr. Coney's absence from a portion of voir dire where trial counsel Casabielle's involvement with the Court Broom investigation was revealed thwarted the fundamental fairness of the proceedings:

Jimmie Coney's absence from another portion of the jury selection process also requires reversal. This portion of the trial involved a discussion outside Coney's presence concerning prospective juror Constance Schopperle. During the court's general questioning of the prospective jurors concerning their backgrounds, juror Schopperle revealed that her husband was an FBI agent (R. 791). Upon further questioning, Ms. Schopperle disclosed that her husband was involved in Operation Court Broom (R. 1003, 1049).

After defense counsel completed his questioning of the prospective jurors, a conference was held outside the presence of Mr. Coney (R. 1081-1085). At this conference, defense counsel requested the opportunity to question Ms. Schopperle further outside the presence of the other jurors (R. 1083). Defense counsel revealed that the subject of such further questioning was "a little more delicate for me personally" (R. 1083). Defense counsel disclosed to the court that his name had appeared in the newspapers in association with the Operation Court Broom investigation (R. 1083-84). Defense counsel requested the opportunity Ms. Schopperle concerning what she had heard about Operation Court Broom and how closely she had been following the investigation. (R. 1084). The court agreed to allow defense counsel to question Ms. Schopperle concerning Operation Court Broom (R. 1084).

Ms. Schopperle was thereafter brought into the courtroom and defense counsel asked her a number of vague questions in an attempt to discover if she knew that defense counsel was under investigation as a part of Operation Court Broom, without disclosing that fact to her by the questioning (R. 1087-89). It did not appear from Ms. Schopperle's responses that she was aware of the fact that defense counsel was one of the individuals under investigation.

Clearly, the fact that this attorney was under investigation as a part of Operation Court Broom was not something that should have been kept a secret from Jimmie Coney. Defense counsel had originally been appointed to represent Jimmie Coney by former Judge Roy T. Gelber (R. 2928-31). The newspaper articles to which defense counsel referred indicated that his name was listed on a federal search warrant served on Gelber's office and home on June 8, 1991, and that the warrant sought "any and all documents reflecting the appointment of attorneys to represent indigent defendants." (A. 1-3). Under these circumstances, it is clear that Jimmie Coney's absence from the conference where it was disclosed that his attorney was under investigation as a part of Operation Court Broom thwarted the fundamental fairness of the proceedings. Reversal is therefore required.

(Initial Brief of the Appellant at 60-61)(emphasis added).

This conflict could not be raised on direct appeal in the context of Strickland because appellate counsel was unable to raise ineffective assistance of trial counsel on direct appeal. Rather the Court Broom case was raised on direct appeal only in a very narrow context related to Mr. Coney's absence from the sidebar concerning Juror Schopperle during voir dire, a proceeding where the record clearly supports that Mr. Casabielle never revealed his involvement in Court Broom to Mr. Coney in the attorney/client context (R. 278-79).

Attachments 1-3 to appellate counsel's initial brief were two Miami Herald articles concerning Operation Court Broom dated June 13 & 15, 1991. The first article indicated that Mr. Casabielle was one of six defense lawyers who had done court-appointed work who had been named in federal search warrants in Operation Courtbroom. The second article detailed that two layers, Willie Castro and Manuel Casabielle, had received 25% of all Judge Roy Gelber's appointments from September 1989 until May 1991.

The figures indicated Casabielle had been appointed to 16 cases for which he had been paid \$15,000 as of May 1991.

The trial record reveals that Mr. Coney had not been privy to the discussions at sidebar concerning whether potential juror Schopperle, whose husband was an FBI agent involved in the Operation Court Broom investigation, might have been aware that trial counsel Casabielle's name had come up in connection to the investigation. As noted supra, the trial record reflects the fact that the substantive sidebar discussion took place "outside the hearing of the defendant and the prospective jury" (R. 1081-85). The relevant exchange as to Court Broom is as follows:

Mr. Casabielle: There is a third one, which is a little more delicate for me personally, that is the FBI agent's wife. Her husband works in -- my name appeared in the papers associated with that investigation. She's the only one that mentioned Courtbroom and I'm not -- that's a signal. I think it's only fair that further inquiry be had in that area.

The Court: Again, how can we do that?

Mr. Casabielle: Your Honor, maybe ask her what she has heard about the operation, and if there's anything about what she's heard that might affect this case, how closely she's followed the investigation, something along those lines, without suggesting that my name has come up in that investigation, but it's an area that, again, should be addressed.

The Court: I'll certainly let you question her on that and ---

Mr. Casabielle: Would the court entertain a -- I haven't established cause yet, so I'm not sure I have.

The Court: We'll have her stay in here.

(R. 1083-84). The record is clear that this occurred outside of Mr. Coney's hearing. Casabielle did later individually voir dire juror Schopperle with Mr. Coney present:

Mr. Casabielle: Ms. Schopperle.

Ms. Schopperle: I'd like to come a little closer.

The Court: That's a good idea.

Mr. Casabielle: And we don't have to worry about the microphone. You indicated that your husband was involved in the Court Broom investigation. How closely have you been following the investigation that your husband is involved in?

A Well, I'm not real good at remembering names, so I would have to say that I don't really know exactly the names of some of the judges involved. I have seen some videotapes that he's taken. Basically --

Q I'm sorry. You have seen video tapes of --

A That my husband has taken, I guess you would say, of subjects, people that are subjects in the investigation. I really don't know what they mean or who they are. Basically, I would have to say, to me, it's just evidence gathering and that's about how I feel about it. I don't know. Maybe you want to ask me something more specific. I'm not sure.

Q Are you familiar with any of the subjects of the investigation?

A A little bit.

Q Can you tell us who they are?

A Oh, you mean the subjects? The people? I can't name names. I'm not sure I remember their names. I'm not

real good at names. I have to work hard at that. I worked hard at remembering your name and yours, but I didn't get yours.

Q Did you have any difficulty?

A I do work hard at that.

Q Did you have any difficulty remembering my name?

A Yes. I don't remember your name.

Q Okay.

The Court: Tell her your name.

Q I will. Manny Casabielle.

A I'm sorry?

Q Manny Casabielle. I've introduced myself a couple of times.

A I know you have. I can't seem to get that one.

Q Is there anything about your husband being involved in that investigation that is going to affect your ability to be a juror in this case?

A I don't believe so.

Q Is there any doubt?

A Is there any doubt? No, I

don't think so. It seems like a completely different matter.

Q Okay, all right, unless the court wishes to inquire.

The Court: I don't have any questions. You could wait outside.

(R. 1087-90). Following the examination of another juror on an unrelated matter, the following was heard:

The Baliff: The last juror, the one before that had the husband that's the FBI agent, she has a concern and wants to bring it to your attention.

The Court: Okay. Ask her to come in. What would you like to say.

Ms. Schopperle: I just hope I haven't done anything to my husband's case.

The Court: I don't think there will be a problem. Would your feelings at all affect your ability to serve as a juror in this case?

Ms. Schopperle: No, no, it's affecting how I feel when I go home. Am I affecting my husband? He's not there, so it will not be discussed.

Mr. Casabielle: I f y o u ' r e instructed by the court obviously that you're not to discuss this case with anybody outside of this courtroom or

even with the jurors until all the evidence is in, until you go to the jury room, you could do that?

A Yes.

Q You wouldn't have like a burning desire to say --

A Well, I'll tell you what. I probably would have some, but I think --

Q Would you be able to control it?

A Yes.

Q Your concern about affecting this case, where does that come from?

A I don't usually discuss my husband's work at all, but when you ask some questions and here i felt that I had to be honest about -- there are some things that I guess do get discussed once in a while. Then after I said it, I realized maybe I should have kept it to myself or I'm not sure.

The Court: Well, is there anything that you know or have learned -- and I'm not going to ask you what you've discussed, really, but do you think, based on anything you may have discussed with your husband about the case, the Operation Courtbroom situation, there's anything at all that could influence you in this case?

A No, it absolutely has not.

The Court: Thanks. Thank you.

(R. 1092-94). Casabielle thereafter used a peremptory challenge to remove Ms. Schopperle from the venire (R. 1112).

Thus, the record of Mr. Coney's trial and direct appeal reveals that Operation Court Broom was mentioned during voir dire, but that Mr. Coney was not present at sidebar when Mr. Casabielle informed the Court that he was a target of the Court Broom investigation. (R. 1081-85). The record below indicated that Mr. Coney had attempted to discharge Mr. Casabielle from the case (R. 39-40). By remaining on the case in spite of Mr. Coney's repeated efforts to replace him, Mr. Casabielle set up a potential conflict between himself and Mr. Coney. Simultaneously, Mr. Casabielle was violating his duty of loyalty to Mr. Coney. (See Rule 4-1.7 Conflict of Interest). Mr. Casabielle's independent professional judgment was compromised by the personal financial incentives that he had based on both the appointment agreement with Judge

Gelber and the financial incentive to remain on Mr. Coney's potentially lucrative case once he was appointed. He violated his duty of loyalty to Mr. Coney when he did not explain this arrangement to Mr. Coney, making it impossible for Mr. Coney, who had tried to fire him to make an informed decision about whether to retain Mr. Casabielle's services. Comment to Rule 4-1.7 bears on precisely this problem:

Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client.

The fact Casabielle hid his Court Broom connection from Mr. Coney during voir dire was to the extreme prejudice of Mr. Coney. Mr. Coney's situation was the situation set up in Cuyler v. Sullivan, 446 U.S. 335 (1980). Here, as there, the actual conflict of interest set out supra adversely affected Mr. Casabielle's performance in Mr. Coney's case. This Court found Mr.

Coney's absence from sidebars having to do with jury selection to be harmless error on direct appeal. Coney v. State, 653 So. 2d 1009 (Fla. 1995). The opinion does not mention the Court Broom sidebar, and it is unclear if harmless error analysis was applied. Appellate counsel did not raise the Court Broom sidebar in his Motion for Rehearing.

Mr. Coney's situation was not a potential conflict of interest, but an actual conflict of interest. Prejudice to Mr. Coney can and should be presumed.

The Miami Herald articles raise the prospect that the appointment of Casabielle to Mr. Coney's capital case was the result of an illegal arrangement of special public defender appointments predicated on kickbacks through Judge Gelber, an arrangement that required that appointed counsel stay on the case until he was paid. There was a direct financial incentive for Casabielle to stay on the case, for ultimately Casabielle was paid almost \$16,000 for the Coney case (R. 323). The sidebar during jury selection where Casabielle revealed that he had been named

in Court Broom protected Casabielle's interests, not Mr. Coney's. Appellate counsel's failure to raise this issue as a conflict of interest pursuant to Cuyler v. Sullivan, 446 U.S. 335 (1980) was deficient performance.

To the extent that appellate counsel failed to adequately raise this issue, Mr. Coney was denied effective assistance of counsel.

B. IMPROPER HARMLESS ERROR ANALYSIS

Judge Smith's sentencing order found the "great risk of harm to many persons" aggravating circumstance (DAR. 312-316). The aggravating circumstance was struck by this Court on direct appeal, yet this Court then found that the trial court's error in including this aggravating circumstance was harmless. Coney v. State at 1015.²

Appellate counsel's January 19, 1995 motion for rehearing raised improper harmless error analysis as to this Court's findings concerning the admission of the testimony of the mother of the 1976 victim at the penalty

²The aggravating circumstance was neither argued nor proposed by the state.

phase and the absence of Mr. Coney from a January 31, 1992 pre-trial hearing and from a bench conference when challenges for cause were exercised.³ Motion at 3-6. However, appellate counsel's motion failed to ask for rehearing on this Court's harmless error findings as to the Schopperle bench conference or the "great risk of harm to many persons" aggravator that this Court struck on direct appeal.

This Court's harmless error analysis was Eighth and Fourteenth Amendment error. The harmless error test was set forth by the United States Supreme Court in Chapman v. California, 386 U.S. 18 (1967). In order for constitutional error to be harmless, the State must show "beyond a reasonable doubt that the error complained of did not contribute to the [outcome] obtained." Yates v. Evatt, 111 S. Ct. 1884 (1991), citing Chapman v. California. The burden is on the State to show the harmlessness of the error and to overcome a presumption of

³These absences are additional support for raising a conflict of interest claim on the direct appeal.

harm. Arizona v. Fulminante, 111 S. Ct. 1246 (1991). If there is a reasonable possibility that the constitutional error might have contributed to the judge's sentence, the error is not harmless beyond a reasonable doubt and Mr. Coney is entitled to relief. Chapman v. California; Yates v. Evatt.⁴ This Court should revisit this harmless error analysis as well as that noted regarding Mr. Coney's presence at critical stages.⁵ Analysis of all preserved and unpreserved error should be considered by this Court to evaluate harmlessness. See Martinez v. State, 761 So. 2d 1074, 1082 (Fla. 2000). To the extent that appellate counsel failed to adequately raise this issue, Mr. Coney

⁴Although appellate counsel successfully argued for this Court to strike the aggravator, he then accepted the court's finding of harmless error without raising the improper harmless error analysis of this Court in his motion for rehearing. Counsel was therefore ineffective.

⁵Because the effect of finding an aggravator exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict, the aggravator must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt. Apprendi, 530 U.S. at 494-95. This did not occur in Mr. Coney's case.

was denied effective assistance of counsel.

C. FAILURE TO RAISE THE UNCONSTITUTIONALITY OF THE DEATH PENALTY

At the time of Mr. Coney's trial, sec. 921.141 (h), Fla. Stat., provided in pertinent part, "The capital felony was especially heinous, atrocious, or cruel." Trial counsel objected to the heinous, atrocious or cruel (HAC) aggravating factor jury instruction (R. 342, R. 2832). Appellate counsel failed to carry forward this objection on appeal.

The United States Supreme Court's opinions in Richmond v. Lewis, 113 S.Ct. 528 (1992) and Espinosa v. Florida, 112 S.Ct. 2926 (1992), require a resentencing before a jury in Mr. Coney's case.

Mr. Coney's penalty phase jury was not given "an adequate narrowing construction," but instead was simply instructed on the facially vague statutory language. Following the death recommendation, the sentencing judge imposed a death sentence. Under Florida law, the judge was required to give great weight to the jury's verdict.

Espinosa.

As the United States Supreme Court recognized in Espinosa, in Florida a sentencing judge in a capital case is required to give the jury's verdict "great weight." As a result, it must be presumed that a sentencing judge in Florida followed the law and gave "great weight" to the jury's recommendation. 112 S. Ct. at 2928. Certainly nothing in Mr. Coney's case warrants setting aside that presumption. Florida law requires that where evidence exists to support the jury's recommendation, it must be followed. Scott v. State, 603 So. 2d 1275 (Fla. 1992). Here the judge considered, relied on, and gave great weight to the tainted jury recommendation. A "new sentencing calculus" free from the taint, as required by Richmond, had not been conducted. The judge was not free to ignore the tainted death recommendation. Scott.

Richmond demonstrates that Mr. Coney was denied his Eighth Amendment rights. His jury was permitted to consider "invalid" aggravation because the aggravating

factors specified by Fla. Stat. § 921.141 are unconstitutionally vague. The jury was not given proper narrowing constructions so the facial unconstitutionality of the statute was not cured. Relief is required because the jury is a sentencer:

Florida has essentially split the weighing process in two. Initially, the jury weighs aggravating and mitigating circumstances, and the result of that weighing process is then in turn weighed within the trial court's process of weighing aggravating and mitigating circumstances.

Espinosa, 112 S. Ct. at 2928.

In Mr. Coney's case, the jury must be presumed to have considered invalid statutory provisions and to have weighed these factors against the mitigation. Espinosa. Unless the Respondent can establish beyond a reasonable doubt that the consideration of the invalid statutory provisions had no effect upon the weighing process, the errors cannot be considered harmless. The mitigation in the record establishes that the errors were not harmless beyond a reasonable doubt. Espinosa and

Richmond require that Mr. Coney receive a new sentencing proceeding in front of a jury that comports with the Eighth Amendment.

Florida's capital sentencing scheme denies Mr. Coney his right to due process of law, and constitutes cruel and unusual punishment on its face and as applied in this case. Florida's death penalty statute is constitutional only to the extent that it prevents arbitrary imposition of the death penalty and narrows application of the penalty to the worst offenders. See Proffitt v. Florida, 428 U.S. 242 (1976). The Florida death penalty statute, however, fails to meet these constitutional guarantees, and therefore violates the Eighth Amendment to the United States Constitution.

The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors, Mullaney v. Wilbur, 421 U.S. 684 (1975), and does not define "sufficient aggravating circumstances." Further, the statute does not sufficiently define for

the consideration each of the aggravating circumstances listed in the statute. See Godfrey v. Georgia, 446 U.S. 420 (1980). These deficiencies lead to the arbitrary and capricious imposition of the death penalty and violate the Eighth Amendment to the United States Constitution.

Florida's capital sentencing procedure does not have the independent reweighing of aggravating and mitigating circumstances required by Proffitt v. Florida, 428 U.S. 242 (1976).

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner, and juries receive unconstitutionally vague instructions on the aggravating circumstances. See Godfrey v. Georgia; Espinosa v. Florida, 112 S. Ct. 2926 (1992).

Florida law creates a presumption of death if a single aggravating circumstance is found. This creates a presumption of death in every felony murder case, and in nearly every premeditated murder case. Once an

aggravating factor is found, Florida law provides that death is presumed to be the appropriate punishment, which can only be overcome by mitigating evidence so strong as to outweigh the aggravating factor. This systematic presumption of death does not satisfy the Eighth Amendment's requirement that the death penalty be applied only to the worst offenders. See Furman v. Georgia, 408 U.S. 238 (1972); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988).

Because of the arbitrary and capricious application of Florida's death penalty, the statute as it exists and as applied is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution.

"...[D]espite the effort of the States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake." Callins v. Collins, 510 U.S. 1141 (1994)(Blackmun, J., dissenting).

"Because I no longer can state with any confidence

that this Court is able to reconcile the Eighth Amendment's competing constitutional commands, or that the federal judiciary will provide meaningful oversight to the state courts as they exercise their authority to inflict the penalty of death, I believe that the death penalty, as currently administered, is unconstitutional." Callins, (Blackmun, J., dissenting).

In Mr. Coney's case, appellate counsel failed to raise the constitutionality of Florida's death penalty statute in Coney's direct appeal. Appellate counsel did not adequately argue this meritorious claim and relief is warranted.

CLAIM III

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

On direct appeal, Mr. Coney challenged his conviction as disproportionate inter alia because it

arose from a lover's quarrel or domestic dispute. As appellate counsel summarized the argument, the murder of Patrick Southworth "resulted from an ongoing, heated domestic confrontation. That being the case, the death penalty in this case cannot withstand proportionality review." Initial Brief at 84. This Court opined only that there was "no error" in the proportionality of Mr. Coney's death sentence. Coney at 1015.

Mr. Coney was indicted for first degree murder of Patrick Southworth by the grand jury on April 6, 1990 on theories of premeditated murder and felony arson murder. (R. 1-2A). The jury was instructed as to the elements of premeditated murder, felony murder, and arson. (R. 224-25, 229). The Court's rejection of the argument should be revisited in light of Apprendi v. New Jersey, 120 S.Ct. 2348 (2000). In Apprendi, the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at

2362-63. The constitutional underpinnings of the Court's holding are the Sixth Amendment right to trial by jury, as well as the Fourteenth Amendment right to due process. Id. at 2355 ("At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without 'due process of law,' Amdt. 14, and the guarantee that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury,' Amdt. 6"). "Taken together, these rights indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'" Id. (quotation omitted).

Mr Coney submits that this matter is ripe for reconsideration in light of the rule discussed in Apprendi. If the Sixth and Fourteenth Amendments are violated under the New Jersey scheme in Apprendi, then Florida's failure to require the State to charge and prove the underlying elements of either premeditated or

felony murder suffers from a similar constitutional flaw. Thus, this issue should be revisited at this time.

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

In Florida, it is the judge and not the jury who finds the specific aggravating factors that make a person death-eligible. Fla. Stat. §921.141 (1),(2)

(1981). See Walton v. Arizona, 497 U.S. 639, 648

(1990). For Sixth Amendment purposes, these aggravators are elements of a death penalty offense, as this Court determined in Dixon. Because the effect of finding an aggravator exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict, the aggravator must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt.

Apprendi, 530 U.S. at 494-95. This did not occur in Mr. Coney's case.

Mr. Coney acknowledges that this Court has held that Apprendi has not impacted Florida's sentencing scheme and has not overruled Walton. Mills v. Moore, 786 So. 2d 532, 537 (Fla. 2001) ("[b]ecause Apprendi did not overrule Walton, the basic scheme in Florida is not overruled either"). See also Brown v. Moore, 26 Fla. L. Weekly S742 (Fla. Nov. 1, 2001); Mann v. Moore, 794 So. 2d 595, 599 (Fla. 2001). However, on January 11, 2002, the Supreme Court granted *certiorari* review in Arizona v. Ring, 25 P.3d 1139 (Ariz. 2001), cert. granted, 122

S.Ct. 865 (2002). In Ring, the Court is going to decide whether Walton should be overruled in light of Apprendi. Thus, Mr. Coney presents this claim at this time for preservation purposes, and submits that relief is warranted.

CONCLUSION

It is clear that several meritorious arguments were available to be raised on direct appeal, yet appellate counsel unreasonably failed to assert them. Particularly when compared with the arguments that appellate counsel did advance, the unreasonably prejudicial performance of appellate counsel is obvious. These errors, singularly or cumulatively, demonstrate that Mr. Coney was denied the effective assistance of appellate counsel.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus has been furnished by United States Mail, first class postage prepaid, to Sandra S. Jaggard, Assistant Attorney General, 444 Brickell Ave., Suite 950, Miami, Florida 33131-2407, on April 18, 2002.

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CERTIFICATE OF COMPLIANCE

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

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