

IN THE SUPREME COURT OF FLORIDA

NO. SC02-2

AMOS LEE KING

Petitioner,

v.

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

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS, REQUEST FOR STAY OF EXECUTION,
AND APPLICATION FOR STAY OF EXECUTION PENDING DISPOSITION OF PETITION
FOR WRIT OF CERTIORARI

Richard Kiley
Florida Bar No. 0558893

April Haughey
Florida Bar No. 0119180

CAPITAL COLLATERAL REGIONAL
COUNSEL - MIDDLE REGION
3801 Corporex Park Drive
Suite 210
Tampa, FL 33619-1136
(813) 740-3544
COUNSEL FOR PETITIONER

PRELIMINARY STATEMENT

Article 1, Sec. 13 of the Florida Constitution provides:
"The writ of habeas corpus shall be grantable of right, freely and without cost." These claims demonstrate that Mr. King was deprived of the right to a fair, reliable, and individualized sentencing proceeding and that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives.

The proceedings in his case will be cited to as follows:

"R." - record on direct appeal from initial trial court proceedings;

"R2." - record on direct appeal from resentencing;

"PC-R." - record of post-conviction proceedings.

REQUEST FOR STAY OF EXECUTION

Mr. King's petition includes a request that the court stay his execution (presently scheduled for January 24, 2002). As will be shown, the issues presented are substantial and warrant a stay. Mr. King respectfully urges that the Court enter an order staying his execution, and , thereafter, that the Court grant habeas corpus relief.

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INTRODUCTION

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

Additionally, this petition presents questions that were ruled on in direct appeal, but should now be revisited in light of subsequent case law or in order to correct error in the appeal process that denied Mr. King his constitutional rights.

As this petition will demonstrate, Mr. King 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 Fla. Const. art. I, § 13. This Court has original jurisdiction pursuant to Fla.R.App.P. 9.030(a)(3) and Fla. Const. art. V, § 3(b)(9). The petition presents constitutional issues which directly concern the judgment of this court during the appellate process and the legality of Mr. King's sentence of death. Jurisdiction in this action lies in this Court for the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. King's direct appeal. See Smith v. State, 400 So.2d 956, 960 (Fla. 1981); Wilson v. Wainwright, 474 So.2d 1162, 1163 (Fla. 1985); Baggett v. Wainwright, 229 So.2d 239, 243 (Fla. 1969); cf. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. King 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 v. Wainwright, 474 So.2d 1162 (Fla. 1985).

GROUND FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. King 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 Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and the corresponding provisions of the Florida Constitution.

PROCEDURAL HISTORY

Mr. King was charged by indictment with first-degree murder, sexual battery, burglary and arson On April 7, 1977. The case was consolidated during voir dire with another case charging Mr. King with attempted murder and escape. The consolidated cases were tried before the Circuit Court Judge John Andrews. Mr. King was represented by Thomas Cole of the Public Defender's Office.

The jury found Mr. King guilty on all counts. At the penalty phase, the jury recommended death. The trial court followed the recommendation and sentenced Mr. King to death.

On direct appeal, the Florida Supreme Court affirmed the conviction and sentence of death. King v. State, 390 So.2d 315 (Fla. 1980). Mr. King sought post-conviction relief, but was denied by the circuit court. On appeal, the Florida Supreme Court affirmed the denial of post-conviction relief. King v. State, 407 So.2d 904 (Fla. 1981). Mr. King filed a Petition for Writ of Habeas Corpus in the United States District Court, Middle District of Florida in 1981. The district court denied

relief, however on appeal, Mr. King's sentence of death was vacated by the Eleventh Circuit Court of Appeals. King v. Strickland, 748 F.2d 162 (11th Cir. 1984); previous history, King v. Strickland, 714 F.2d 1481 (11th Cir. 1983).

Mr. King was resentenced and death was again imposed. The Florida supreme Court affirmed the conviction and sentence of death. King v. State, 514 So.2d 354 (Fla. 1987). A Petition for Writ of Habeas Corpus was filed by Mr. King, as well as a Motion for Post-conviction Relief. An evidentiary hearing was conducted in the circuit court on the Motion for Post-conviction Relief, and relief was denied. The Florida Supreme Court affirmed the denial of post-conviction relief. King v. State, 597 So.2d 780 (Fla. 1992). The Florida Supreme Court also denied Mr. King's Petition for Writ of Habeas Corpus. King v. Dugger, 555 So.2d 355 (Fla. 1990).

In October of 1992, Mr. King filed a Petition for Writ of Habeas Corpus in the United States District Court, Middle District of Florida. The District Court denied relief on May 12, 1998. An appeal of the denial was filed with the Eleventh Circuit Court of Appeals in May of 1999. On November 30, 1999, the Eleventh Circuit denied Mr. King's appeal. King v. Moore, 196 F.3d 1327 (11th Cir. 1999). During the spring of 1997, Mr. King filed a pro-se Petition for Writ of Habeas Corpus in the

Florida Supreme Court. Mr. King's pro-se pleading was denied by the Florida Supreme Court in an unpublished order filed on March 28, 1997. A subsequent Motion for Rehearing on said petition was denied in an unpublished order filed on May 30, 1997.

On November 19, 2001, a death warrant was signed scheduling Mr. King's execution for January 24, 2002. Mr. King filed a Successive Motion to Vacate Judgement and Sentence in the circuit court on December 18, 2001. The Motion to Vacate was denied on January 1, 2002. Mr. King now files this Petition for Writ of Habeas Corpus simultaneously with the appeal of the denial of his Successive Motion to Vacate Judgement and Sentence.

CLAIM I

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ON DIRECT APPEAL THE ERRONEOUS RULING OF THE TRIAL COURT WHICH ALLOWED A STATE WITNESS TO TESTIFY THAT A STAIN SEEN ON MR. KING'S CLOTHING WAS HUMAN BLOOD.

Mr. King's conviction for the murder of Natalie Brady was obtained through circumstantial evidence. The evidence against Mr. King was obtained primarily through the testimony of the victim of the attempted murder, James McDonough. Mr. McDonough was employed at a work release center where Mr. King was carrying out the remainder of a sentence on unrelated charges. Mr. McDonough testified that Mr. King was missing from his room

during a bed check in the early morning hours. McDonough testified that he found Mr. King outside of the facility with human blood on the crotch area of his pants. The testimony, if believed to be true, would have established that Mr. King had human blood on him and was outside of the facility at approximately the same time Mrs. Brady was murdered in a house located close to the facility. This testimony was critical to the conviction of Mr. King.

During the guilt phase of Mr. King's trial, defense counsel moved in limine to exclude any testimony on behalf of witness McDonough concluding that a stain seen on Mr. King's clothing was human blood. (R. 1348). The grounds for the motion were that McDonough was not an expert and should not be allowed to render an opinion on the substance of the stain he viewed on Mr. King. The Court did not make a ruling immediately. (R. 1349). McDonough testified that he grew up in a family funeral business, was a licenced mortician, had an opportunity to observe blood in the business, and that the funeral home was involved in approximately twenty-five hundred embalmings over the course of twenty-two years. (R. 1353-1354). McDonough was not tendered as an expert. When the witness appeared about to testify as to his opinion regarding the blood, defense counsel objected. (R. 1377). The judge overruled the objection. (R.

1379). McDonough testified that the crotch of Mr. King's pants, "was soaked in human blood." (R. 1379). Section 90.701

Florida Statutes (2001) states:

Opinion testimony of lay witnesses.- If a witness is not testifying as an expert, the witness's testimony about what he or she perceived may be in the form of inference and opinion when:

(1) The witness cannot readily, and with equal accuracy and adequacy, communicate what he or she has perceived to the trier of fact without testifying in terms of inferences or opinions and the witness's use of inferences or opinions will not mislead the trier of fact to the prejudice of the objecting party; and

(2) The opinions and inferences do not require a special knowledge, skill, experience, or training.

Fla. Stat. ch. 90.701 (2001).

To render an opinion the stain on Mr. King's clothing was human blood usurps the province of the jury. Witness McDonough could have described the stain without making the ultimate conclusion as to the constitution of such a stain. He did not perform any blood typing test, nor was any such test performed at a later time. Thus, to render such a conclusion usurped the province of the jury and an objection to such testimony should have been sustained. See, C. Ehrhardt, *Florida Evidence* sec. 701.1, at 562 (2001 Edition); Floyd v. State, 569 So.2d 1225 (Fla. 1990); Jones v. State, 440 So.2d 570 (Fla. 1983). The failure of

appellate counsel to raise this issue on direct appeal demonstrates that counsel's performance was deficient and that the deficiencies prejudiced Mr. King. Without the conclusory opinion that Mr. King's clothing had human blood upon it, the jury would not have had sufficient evidence tying Mr. King to the murder of Mrs. Brady. Thus, Mr. King would have been acquitted of that crime. The prejudice to Mr. King by allowing clearly inadmissible opinion testimony is great, and renders his conviction for the murder of Natalie Brady erroneous. Such an error violated Mr. King's constitutional rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding rights of the Florida Constitution.

CLAIM II

MR. KING'S APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ON DIRECT APPEAL THE TRIAL COURT'S ERROR IN ALLOWING IRRELEVANT INFORMATION PUT FORTH SOLELY TO BOLSTER THE CREDIBILITY OF A STATE WITNESS TO BE HEARD BY THE JURY OVER DEFENSE OBJECTION.

During the guilt phase of Mr. King's trial, the State called witness James McDonough to the stand. (R. 1350). The prosecutor then began to question the witness about how many children he had, and what their ages were. (R. 1351). When the defense objected on relevancy grounds, the prosecutor stated:

"In King's statement to the deputy, your Honor, he eluded to the fact this man attacked him, that puts this witness's character in issue. I think it is relevant that the jury be made aware of his background and reputation, possibly not reputation, but certainly his background. They have got to determine whether or not he is the type of man who would attack this nice gentleman sitting over here."

(R. 1351).

The objection was overruled and the prosecutor went on to elicit the ages of the witness's children, the fact that one of the children had just graduated and was on the list for West Point, his detailed employment history background, his family business, and his education. (R. 1351-1354). At this point, defense counsel had not even made an inference that King was attacked by this witness. There was nothing mentioned in opening statement, nor was there a self-defense claim proffered. Thus, McDonough's credibility and character had not been attacked by the defense and the prosecutor was not rebutting a defense attack.

"The good character of a witness may not be supported unless it has been impeached by evidence." Mohorn v. State, 462 So.2d 81 (Fla. 4th DCA 1985); See McCormick, *Evidence* sec. 47 (4th ed. 1992). In Hall v. State, 634 So.2d 1124 (Fla. 5th DCA 1994), it was held to be reversible error to admit testimony of an arresting officer's good conduct record and the lack of any

disciplinary proceedings during his twelve years as an officer. Similarly, it constituted reversible error to allow the blatant bolstering of the State's witness by the prosecution. The testimony of witness McDonough was critical in this circumstantial evidence case. (See Claim I). By allowing the prosecutor to bolster his character, the judge committed reversible error. Given that such error was preserved by objection, it was the duty of appellate counsel to raise such issue on direct appeal. The failure to raise such an issue on direct appeal constituted ineffective assistance of appellate counsel. Appellate counsel's conduct fell well below that of reasonably effective counsel and Mr. King was prejudiced. See, Strickland v. Washington, 466 U.S. 668 (1984). The improper bolstering of the main state witness created a picture for the jury that the witness was a good father, hard working, educated and therefore a witness to be believed. Thus, the witness's testimony was given greater weight than it should have been, resulting in an unreliable conviction against Mr. King.

CLAIM III

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ON DIRECT APPEAL THE TRIAL COURT'S ERRONEOUS RULING WHICH ALLOWED HEARSAY TESTIMONY TO BE HEARD BY THE JURY REGARDING WHETHER MR. KING WAS OUTSIDE THE CORRECTIONAL FACILITY ON THE NIGHT OF THE

**MURDER OF NATALIE BRADY OVER DEFENSE
OBJECTION.**

During the guilt phase of the trial, witness Carlos Hudson testified that he heard James McDonough looking for Mr. King outside of Hudson's window at the correctional facility. (R. 1441). The prosecutor asked Hudson, "What did you hear Mr. McDonough say?" (R. 1441). Defense counsel objected on hearsay grounds and the objection was overruled. (R. 1441). The prosecutor repeated the question, "What did you hear him say?" Hudson answered, "There you are." (R. 1441). This testimony corroborated McDonough's testimony that Mr. King was discovered outside of the facility. Such testimony constituted hearsay under section 90.802 Florida Statutes (2001). The objection was made and the issue preserved for appeal, however appellate counsel for Mr. King did not raise this issue on direct appeal. Given that Mr. King's conviction was based upon circumstantial evidence, the prejudice to him by this inadmissible testimony was great. Jurors relied on the corroborating hearsay to find that Mr. King was outside of the facility, within proximity of the house where the murder of Natalie Brady occurred. Without such corroboration, the jury would not have had sufficient reason to believe that Mr. King was outside of the facility, thus the prejudice to Mr. King was substantial and the verdict unreliable. Appellate counsel was ineffective for failing to

raise this issue on direct appeal, and his conduct fell below the acceptable standard of reasonableness required by the United States Constitution and the Florida Constitution.

CLAIM IV

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ON DIRECT APPEAL THE ERRONEOUS RULING OF THE TRIAL COURT ALLOWING HEARSAY TO BE ADMITTED REGARDING AN OFFICER'S INTERVIEW WITH NEIGHBORS.

During the guilt phase of Mr. King's trial, Detective Bragdon testified that Mr. King led them to a garbage can where the clothes he was wearing on the night of the murder had been deposited. Upon arrival at the garbage can, the detective found it to be empty except for some papers. Defense counsel, anticipating that the detective was about to testify that interviews with the neighbors were conducted, and the garbage cans had not been emptied, objected to the testimony on hearsay grounds. (R. 1754). The objection was overruled. (R. 1754). The detective then testified that Detective Pandakos, his partner, interviewed neighbors who said the garbage can had not been emptied. (R. 1755). Such testimony was clearly inadmissible hearsay under section 90.802, Florida Statutes (2001). Such testimony was allowed in violation of Mr. King's right to confront witnesses. No "neighbor's" names were

provided to defense counsel and by allowing the testimony, the judge committed reversible error.

The hearsay was objected to and the issue preserved for direct appeal. However, appellate counsel never addressed the issue in King's appeal. Such conduct fell below the threshold of reasonably effective counsel. The prejudice to Mr. King was simple; the testimony implied that he was not telling the truth about where he put his clothes. Thus, the jury was given the impression that Mr. King was not telling the truth or was lying about what he did with the clothes. The prejudice to Mr. King was great and violated his rights as guaranteed by the Constitution of the United States.

CLAIM V

MR. KING'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN THE PROSECUTOR IMPROPERLY ARGUED FUTURE DANGEROUSNESS DURING GUILT PHASE CLOSING ARGUMENT. APPELLATE COUNSEL WAS INEFFECTIVE FOR NOT RAISING THIS ERROR ON DIRECT APPEAL.

During the closing argument of the guilt phase, the prosecutor made the following statement:

"I would like you to consider this. The judge will instruct you the maximum penalty as to each particular crime, the maximum, not the minimum, is that unless you come back guilty as charged which required even if he is not put to death, a twenty-five year minimum sentence. In other words, for twenty-five years he couldn't be paroled, murder one. Every other crime that we have

charged or any lesser crime of the murder one, like murder two or murder three or manslaughter, all have provisions for parole and Amos Lee King is walking back out on the streets or down at another work release center doing the same thing he did before."

(R. 1952-1953).

The prosecutor's statements argued to the jury that if they came back with a conviction less than first degree murder, Mr. King would be right back out on the street committing the same crimes. Such an argument of future dangerousness is irrelevant to the question of a defendant's guilt. McClain v. State, 477 S.E.2d 814 (Ga. 1996). In McClain, the court found the argument improper, but harmless in light of overwhelming evidence of guilt. Id. at 821. That is not the case here. Given the meager amount of evidence used to convict Mr. King, such an argument is not harmless. Where an improper remark to the jury could be said to be so prejudicial to the rights of the accused that neither rebuke nor retraction would cure the error, the Supreme Court can review the error even though no objection was made. Grant v. State, 194 So.2d 612 (Fla. 1967)(reversing conviction and remanding for new trial due to prosecutor's comment: "Do you want to give this man less than first degree murder and the electric chair and have him get out and come back and kill somebody else, maybe you?"). The error in this case is

analogous to the error in Grant. Thus, this court has the authority to review such a highly prejudicial remark.

Appellate counsel failed to raise the error on direct appeal. Such an exclusion constituted conduct below a reasonable standard of effective appellate counsel. The prejudice to Mr. King was paramount, in that the jury may have convicted him of first degree murder in order to ensure he was not afforded an opportunity to commit another crime, not on the basis of the evidence against him.

CLAIM VI

**THE PROSECUTOR COMMITTED FUNDAMENTAL ERROR
IN CLOSING ARGUMENT WHEN HE DENIGRATED
DEFENSE COUNSEL.**

During closing argument in guilt phase, the prosecutor made the following statements:

"Now, Mr. Cole [defense counsel] then, in what I like to term blowing smoke, says..."

(R. 1945).

"It wasn't any argument but Mr. Cole now is suddenly pulling that out of the sky to try and create reasonable doubt."

(R. 1946).

"Mrs. Dubrian said she never saw blood on the shirt. She said on the pants, just like McDonough, that is again pulling straws out of the air."

(R. 1947).

"Mr. Cole also conveniently forgot to tell you that, remember Shockley's conversation with King?"

(R. 1950).

Such comments from the prosecutor constituted improper argument by suggesting that defense counsel was not being truthful and was deliberately misleading the jury. In Briggs v. State, 455 So.2d 519 (Fla. 1st DCA 1984), the issue of prosecutor's "trying" defense counsel rather than the case was the predominant issue on appeal. The court agreed with the appellant's argument regarding a trend of prosecutors to make arguments against defense counsel. Simpson v. State, 352 So.2d 125 (Fla. 1st DCA 1977)(prosecutor referred to 'one of the favorite tricks of defense counsel'); Hufham v. State, 400 So.2d 133 (Fla 1st DCA 1981)(prosecutor argued defense attorneys come up with arguments to thwart common sense of the jurors); Westley v. State, 416 So.2d 18 (Fla. 1st DCA 1983)(prosecutor referred to defense as 'smoke screen'); McGee v. State, 435 So.2d 854(Fla. 1st DCA 1983)(prosecutor engaged in 'smoke screen' argument). The court condemned the prosecutor's actions in each case, however found the improper comment to be harmless in light of overwhelming evidence of guilt or procedural bar. Briggs at 521. The court went on to say that if such arguments continued, the appellate court would be forced to fashion a special remedy and reverse

convictions so obtained. Id. at 521. Since that time, several convictions have been reversed in Florida based upon improper prosecutorial comment against defense counsel. Alvarez v. State, 574 So.2d 1119 (Fla 3rd DCA 1991)(reversed due to prosecutor's comments that defense was nitpicking and trying to insult somebody's intelligence); Knight v. State, 672 So.2d 590 (4th DCA 1996)(prosecutor's comments rose to level of fundamental error); Caraballo v. State, 762 So.2d 542 (Fla. 5th DCA)(comments constituted fundamental error); D'Ambrosio v. State, 736 So.2d (Fla. 5th DCA 1999), (the prosecutor's misconduct in arguing defendant's defense as innuendo, speculation and "a sea of confusion" that defense counsel "prays you get lost in" part of the argument causing reversal).

In Mr. King's case, the prosecutor's denigration of defense counsel was not harmless and constituted fundamental error. Appellate counsel's failure to raise this issue on direct appeal constituted ineffective assistance of appellate counsel. Given the circumstantial evidence of this case, such comments prejudiced Mr. King and violated his fundamental rights under the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

CLAIM VII

**MR. KING'S RIGHTS WERE VIOLATED BY THE
STATE'S EX-PARTE COMMUNICATIONS WITH THE**

COURT AND THE STATE'S AND COURT'S
UNDISCLOSED CONSIDERATION GIVEN TO STATE
WITNESSES IN EXCHANGE FOR THEIR TESTIMONY.
APPELLATE COUNSEL WAS INEFFECTIVE FOR
FAILING TO ADDRESS THIS ISSUE ON DIRECT
APPEAL.

Mr. King's trial was the first in which the media was allowed to photograph the proceedings. When Mr. King's counsel was not present in the courtroom, the state approached the court for an ex-parte communication. After the state conferred with the trial court, the trial court spoke with the court bailiff, and the cameras were removed from the courtroom. In a letter to the Florida Supreme Court, the trial court stated that certain state witnesses refused to testify unless the cameras were removed from the courtroom. In order to appease the state witnesses and ensure their favorable testimony, the state and the trial court moved, ex-parte, to remove the cameras from the court. (See exhibit 13 of Mr. King's Successive Motion to Vacate Judgement and Sentence filed on December 18, 2001).

The state and trial court's ex-parte communications violated Mr. King's fundamental due process rights to a fair trial and his Sixth Amendment right to counsel. Improper *ex parte* communications between the judiciary and single litigants violate constitutional requirements. In Rose v. State, 601 So.2d 1181 (Fla. 1992), this Court wrote:

Noting is more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant.. . . The other party should not have to bear the risk of factual oversights or inadvertent negative impressions that might easily be corrected by the chance to present counter arguments...

Id. at 1183. The ex-parte deal with the state witness for their testimony also violated Mr. King's due process rights under Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763 (U.S. 1971); Kyles v. Whiteley, 514 U.S. 419, 115 S.Ct. 1555 (U.S. 1995); Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963). Since direct appeal counsel was appointed to Mr. King's case at the time of the filing of the letter by the circuit court admitting to the conversation between the prosecutor and the judge, appellate counsel had a duty to raise the issue on direct appeal. The failure to do so constituted ineffective assistance of appellate counsel.

The prejudice to Mr. King followed from the testimony of the state witnesses who were given preferred treatment by the judge. One of the witnesses in particular, Mr. Charles Hudson would not have testified had the judge not ordered the media to abstain from photographing him. His testimony corroborated the testimony of a key state witness as to the location of Mr. King outside of the facility near the time of Natalie Brady's death.

(See Claim III). Thus, the judge's ensuring of such testimony prejudiced Mr. King in that his conviction was based upon testimony which would not have been heard by the jury. Such actions violated Mr. King's constitutional rights as guaranteed by the United States Constitution.

CLAIM VIII

MR. KING'S APPELLATE ATTORNEY WAS INEFFECTIVE FOR FAILING TO FILE PLEADINGS ENSURING THE PRESERVATION OF THE PHYSICAL EVIDENCE USED AGAINST MR. KING AT TRIAL. APPELLATE COUNSEL HAD A DUTY TO ENSURE THE PRESERVATION OF SUCH EVIDENCE FOR FURTHER REVIEW.

The only piece of physical evidence linking Mr. King to the murder of Natalie Brady, the type A secretor blood found in vaginal washings taken from the victim, is unavailable for independent testing. Circuit Court Judge Shaeffer has ruled that the vaginal washings were destroyed within two years of the trial conducted in 1977. If the circuit court's findings are correct, the vaginal washings would have been destroyed during the pendency of Mr. King's appeal, while he was represented by appellate counsel. Appellate counsel was aware that trial counsel had moved for suppression of such evidence. (R. 592-594). Appellate counsel was also aware of the importance of such evidence in the conviction of Mr. King. It was clear that such physical evidence would be the subject of further review.

Counsel did not, however, take any step to ensure the preservation of such evidence for further review. The failure of the appellate attorney to move to preserve such evidence constitutes action beyond the scope of a reasonable attorney.

It has been held that an appellate attorney is ineffective when they fail in their duty to obtain a record adequate for consideration of a defendant's claims of error. People v. Barton, 21 Cal.3d 513 (Cal. 1978). By failing to ensure the preservation of the blood evidence, appellate counsel precluded Mr. King of further review of that evidence. Thus, appellate counsel should have known that the evidence needed to be preserved for further proceedings. The inability of the court to now review subsequent testing upon such evidence has resulted in prejudice to Mr. King, in that such testing would have shown he was not the perpetrator of the murder of Natalie Brady.

CLAIM IX

THE FLORIDA DEATH SENTENCING STATUTE AS APPLIED IS UNCONSTITUTIONAL UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Notwithstanding this Court's decision in Mills v. Moore, 786 So.2d 532 (Fla. 2001), Mr. King respectfully submits that considerations of Due Process require that the jury unanimously find the existence of each statutory aggravating factor before

it may be used to impose the death penalty. Mr. King raises this argument at this time to ensure the issue is preserved for further review.

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 v. New Jersey, 530 U.S. 466 120 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 Amos King's penalty phase, section 775.082(1), Florida Statutes (1977), 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(1)(1991).

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 (2001); Fla. Stat. §921.141(2)(a), (3)(a) (2001). 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 (2001). 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.

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 Amos King'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).

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 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.

This court's recent decision in Mills v. Moore, 786 So.2d 532, stated that Apprendi did not apply to capital sentencing schemes. Mills, at 537. This court cites Weeks v. State, 761

A.2d 804 (Del. 2000), as important authority in reaching its decision:

"Importantly, in Weeks v. Delaware, a capital defendant brought his second habeas petition on October 27, 2000, alleging an Apprendi violation and seeking a stay of his execution which was set for November 17, 2000. The trial court ruled that Apprendi did not apply to Weeks' case. Weeks appealed and the trial court's ruling was affirmed. On November 16, 2000, just one day before the scheduled execution, the United States Supreme Court denied certiorari. Weeks v. Delaware, ___U.S. ____, 121 S.Ct. 476, 148 L.Ed.2d 478 (2000). The Supreme Court's denial of certiorari indicated that the Court meant what it said when it held that Apprendi was not intended to affect capital sentencing schemes."

Mills, at 537.

This reasoning does not apply to Mr. King due to the substantial differences between Mr. King's case the Weeks case. In Weeks, the defendant waived his right to a trial by jury during the guilt phase and pled guilty to one count of intentional murder and one count of felony murder. Weeks v. State, 761 A.2d 804 (Del. 2000). The plea to two counts of murder involving two different victims automatically established the existence of two statutory aggravators. Weeks, at 805. Thus, the determination of the existence of those aggravators by a jury was waived by the guilty plea. In Mr. King's case, there was no guilty plea. Thus, Mr. King's argument regarding the appropriateness of the

jury's unanimous determination of the aggravators is distinguishable from Weeks.

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 Amos King's case. Thus, the Florida death penalty scheme is unconstitutional as applied.

CLAIM X

MR. KING'S INCARCERATION ON DEATH ROW FOR, AT PRESENT, TWENTY-FIVE YEARS, CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT AND DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Mr. King was convicted of a crime which occurred May 18, 1977, and he has been on death row since. As a result of errors by the State, Mr. King's sentence and conviction did not become final until 1987.

Although the Florida Supreme Court rejected the instant argument under less egregious circumstances in Knight v. State, 721 So. 2d 287 (Fla. 1998), cert denied, 528 U.S. 990 (1999), life on death row is fundamentally different from life in the general population of the prison, and the cruel and unusual sentence of literal life on death row has been caused by

unnecessary delays and errors by the State in failing to properly prosecute Mr. King. Life on death row is psychologically devastating with the punishment of incarceration multiplied exponentially by the psychological torture of waiting for execution. Life on death row is further punishing in that the inmates are isolated for all but a few hours a week and have significantly fewer rights than inmates in the general population. In Lackey v. Texas, 514 U.S. 1045, 115 S.Ct. 1421 (1995), subsequent proceeding, Lackey v. Scott, 514 U.S. 1093 (1995), the U.S. Supreme Court ultimately denied Mr. Lackey's petition for certiorari by the memorandum opinion of Justice Stevens. Justice Stevens and Justice Breyer conclude a lucid review of the instant argument by declaring that the issue is undecided. It is important to note that Lackey addressed a 17-year delay in execution. Also, Lackey notes that there may be factual issues to resolve regarding the cause of the delays. Lackey at 1422.

Widespread authority from the U.S., and other jurisdictions, supports Mr. King's claims of cruel and unusual punishment for twenty-five years as his case traveled up and down the court system for years of delays. See, e.g., Coleman v. Balkcom, 451 U.S. 949, 952 (1981)(Stevens, J. Concurring in the denial of certiorari)(recognizing that the mental pain suffered by a

condemned prisoner awaiting execution "is a significant form of punishment that may well be compared to the consequences of the ultimate step itself [i.e., the actual execution]"); Solesbee v. Balkcom, 339 U.S. 9, 14 (1950)(Frankfurter, J., dissenting)(in the history of murder, the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon."); Furman v. Georgia, 408 U.S. 238, 288-289 (1972)(Brennan, J., concurring)("we know that mental pain is an inseparable part of our practice of punishing criminals by death, the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death."); People v. Anderson, 493 P. 2d 880, 6 Cal. 3d 628, 649 (Cal. 1972) ("the cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to the execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the [protracted] process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture."); Suffolk County District Attorney v. Watson, 411 N.E. 2d 1274, 1289 (Mass. 1980)(arguing execution unconstitutional because it will be carried out only

after long delays); Commonwealth v. O'Neill, 339 N.E. 2d 676 (Mass. 1975)(noting anguish in anticipation of execution); State v. Richmond, 886 P.2d 1329 (AZ 1994); Hopkinson v. State, 632 P.2d 79(WY 1981)(dissent, dehumanizing effect of long imprisonment pending execution); Soering v. United Kingdom, 11 European Human Rights Reporter 439 (1989)(extradition to U.S. to face capital murder charges refused because of time on death row if sentenced to death); Vatheeswarren v. State of Tamil Nadu, 2 S.C.R. 348 (India, 1983)("dehumanizing character of delay"); Sher Singh v. State of Punjab, 2 SCR 582 (India 1983)(Prolonged delay in the execution an important consideration in considering whether sentence should be carried out); Catholic Commission for Justice and Peace in Zimbabwe v. Attorney General, No. S.C. 73/93 (Zimbabwe 1993) [reported in 14 Human Rights L. J. 323 (1993)].

Similar views have been expressed by legal commentators and mental health experts. See, e.g., Schabas, Execution Delayed, Execution Denied, 5 Crim. L. Forum 180 (1994); Lambrix, The Isolation of Death Row in Facing the Death Penalty 198 (Radelet, ed. 1989); Millemann, Capital Postconviction Prisoners' Right to Counsel, 48 MD. L. Rev. 455, 499-500 (1989)("There is little doubt that the consciousness of impending death can be immobilizing... this opinion has been widely shared by

[jurists], prison wardens, psychiatrists and psychologists, and writers.")(Citing authorities); Mello, Facing Death Alone, 37 Amer. L. Rev. 513, 552 and n. 251 (1988)(same)(citing studies); Wood, Competency for Execution: Problems in Law and Psychiatry, 14 Fla. St. U. L. Rev. 35, 37-39 (1986)("The physical and psychological pressure present in capital inmates has been widely noted... Courts and commentators have argued that the extreme psychological stress accompanying death row confinement is an eighth amendment violation in itself or is an element in making the death penalty cruel and unusual punishment.")(citing authorities); Stafer, Symposium on Death Penalty Issues: Volunteering for Execution, 74 J. Crim. L. 860, 861 & n.10 (1983)(citing studies); Holland, Death Row Conditions: Progression Towards Constitutional Protections, 19 Akron L. Rev. 293 (1985); Johnson, Under Sentence of Death: The Psychology of Death Row Confinement, 5 Law and Psychology Review 141, 157-60 (1979); Hussain and Tozman, Psychiatry on Death Row, 39 J. Clinical Psychiatry 183 (1979); West, Psychiatric Reflections on the Death Penalty, 45 Amer. J. Orthopsychiatry 689, 694-695 (1975); Gallomar and Partman, Inmate Responses to Lengthy Death Row Confinement, 129 Amer. J. Psychiatry 167 (1972); Bluestone and McGahee, Reaction to Extreme Stress: Impending Death By Execution, 119 Amer. J. Psychiatry 393 (1962); Note, Mental

Suffering Under Sentence of Death: A Cruel and Unusual Punishment, 57 Iowa L. Rev. 814, 830 (1972); G. Gottlieb, Testing the Death Penalty, 34 S. Cal. L. Rev. 268, 272 and n. 15 (1961); A. Camus, Reflections on the Guillotine in Resistance, Rebellion and Death, P. 205 (1966)("As a general rule, a man is undone waiting for capital punishment well before he dies."); F. Dostoyevsky, The Idiot, pp. 47-48 (D. Magarshack trans. 1955); Duffy and Hirshberg, Eighty-Eight Men and Two Women, P. 254 (1962) ("One night on death row is too long, the length of time spent there by [some inmates] constitutes cruelty that defies the imagination. It has always been a source of wonder to me that they didn't all go stark, raving mad.")(Quoting former warden of California's San Quentin Prison).

Because of the cruel and unusual nature of serving such a sentence on death row inflicted on Mr. King by the State, Mr. King is entitled to have his death sentence commuted.

CLAIM XI

THE STATE OF FLORIDA'S CLEMENCY PROCESS VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE UNITED STATES CONSTITUTION AND THE CONSTITUTION OF THE STATE OF FLORIDA.

The Rules of Executive Clemency state when referring to death penalty cases: "Cases investigated under previous administrations may be reinvestigated at the Governor's

discretion." State of Florida Rules of Executive Clemency, Rule 15C (2000). Such an arbitrary procedure has the effect of granting one person access to clemency proceedings, while others who are similarly situated have no access. To compound this problem, there is no set procedure affording death penalty prisoners counsel to promulgate such claims even after a warrant has been signed.

The clemency process has been recognized as an integral component in the protection of those individuals who may have been falsely accused and convicted but are procedurally precluded from raising appropriate defenses through statutory bar. Herrera v. Collins, 506 U.S. 390, 113 S.Ct. 853 (1993). Amos King has maintained his innocence from the outset, yet at this critical stage in his proceeding, is not represented by clemency counsel. His post-conviction counsel, currently Capital Collateral Regional Counsel, is precluded under statute from representing him in a clemency proceeding. Mr. King's actual innocence and innocence of the death penalty claims otherwise barred by statute will not be effectively prosecuted although others, either through the arbitrary appointment of clemency counsel or the financial wherewithal to hire independent counsel, are afforded the opportunity. As so critically noted by Chief Justice Rehnquist in Herrera while

denying habeas relief, "This is not to say, however, that petitioner is left without a forum to raise his actual innocence claim. For under Texas law, petitioner may file a request for executive clemency...Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted," Id at 866. Amos King, neither capable of retaining private counsel or afforded separate clemency counsel, does not enjoy this "fail safe" otherwise afforded to others. Florida's failure to provide clemency counsel results in an arbitrary, disparate and detrimental treatment of Amos King in violation of his due process and equal protection rights as guaranteed by the United States Constitution and the Constitution of the State of Florida.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. King respectfully urges this Honorable Court to grant habeas relief.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the following has been has been furnished by United States Mail, first class postage

prepaid, to all counsel of record on this _____ day of _____, 2002.

Richard Kiley
Florida Bar No.
Assistant CCRC

April Haughey
Florida Bar No. 0119180
Assistant CCRC

CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619
813-740-3544

Counsel for Petitioner

Copies furnished to:

Carol M. Dittmar
Assistant Attorney General
Office of the Attorney General
Westwood Building, 7th Floor
2002 N. Lois Avenue
Tampa, FL 33607

C. Marie King
Assistant State Attorney
Office of the State Attorney
P.O. Box 5028
Clearwater, FL 33758-5028

Commission on Capital Cases
ATTN: Mary Jean
402 S. Monroe Street
Tallahassee, FL 32399-1300

Susan Schwartz
Assistant General Counsel
Florida Department of Corrections
2601 Blair Stone Road
Tallahassee, FL 32399-2500

The Honorable Thomas D. Hall
Clerk, Supreme Court of Florida
ATTN: Tanya Carroll
Supreme Court Building
500 S. Duval Street
Tallahassee, FL 32399-1927

United States Court of Appeals for the
Eleventh Circuit
ATTN: Joyce Pope
56 Forsyth Street N.W.
Atlanta, GA 30303

CERTIFICATE OF COMPLIANCE

We hereby certify that a true copy of the foregoing Petition for Writ of Habeas Corpus, was generated in a Courier non-proportional, 12 point font, pursuant to Fla.R.App.P. 9.210.

Richard Kiley
Florida Bar No.
Assistant CCRC

April Haughey
Florida Bar No. 0119180
Assistant CCRC
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619
813-740-3544

Counsel for Petitioner