IN THE SUPREME COURT OF FLORIDA
CASE NO: SC05-610

MICHAEL BERNARD BELL,
Petitioner

vs.

JAMES B. CROSBY, JR.,
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS
Respondent

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This petition for habeas corpus relief is being filed in order to address substantial claim error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, claims demonstrating that Mr. Bell was deprived of the effective assistance of counsel on direct appeal proceedings that resulted in his conviction and death sentence violated fundamental constitutional guarantees.

Significant errors which occurred at Mr. Bell's capital sentencing and trial were not

presented to this Court on direct appeal due to the ineffective assistance of Appellate counsel. Citations to the trial record shall be TR page ___. Citations to the record on direct appeal explained herein shall as (PCR. Page___). All other citations shall be self-explanatory.

A Writ of Habeas Corpus in an original proceeding in this Court is governed under Florida Rules of Appellate Procedures, 9.1000. This Court has original jurisdiction under Fla.R.App.P. 9.130(3) and Article V §3(b)(9), Fla. Const. Art. 1 Sec. 13 of the Florida Constitution guarantees that "[t]he writ of habeas corpus shall be grantable rights, freely and without cost".

Mr. Bell respectfully requests Oral Argument. The opportunity to air the issues contained herein is appropriate in this case as this Court has allowed Oral Argument in capital cases in a similar procedural posture.

INTRODUCTION

Significant errors which occurred at Mr. Bell'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, demonstrated that counsel's performance was deficient, and that said deficiencies materially prejudiced Mr. Bell. 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). Further, the claims omitted by Appellate counsel stated herein established that ". . . confidence in the correctness and fairness of the result has been undermined". Id. at 1165 (emphasis is original). Finally, this petition presents questions that were not decided on direct appeal, but should now be visited pursuant to the appropriate case law and in order to correct error in the appeal process that denied fundamental constitutional rights. Accordingly, as this petition will demonstrate, Mr. Bell 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) and Art. I, Sect. 13. Fla. Const. This Court has original jurisdiction pursuant to Fla.R.App.P. 9.030(a)(3) and Article V, Section 3(b)(9), Florida Const. This petition presents constitutional issues which directly concern the judgment of this Court during the Appellate process and the legality of Mr. Bell's sentence of death.

Jurisdiction in this action lies in this Court, Smith v. State, 400 S.2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard but denied Mr. Bell's direct appeal. Wilson v. Wainwright, 474 So.2d 1163 (Fla. 1985); Baggett v. Wainwright, 392 So.2d 1327 (Fla. 1981).

A petition for a Writ of Habeas Corpus is the proper means for Mr. Bell to raise the claims presented herein. Way v. Dugger, 568 So.2d 1263 (Fla. 1990); Downs v. Dugger, 514 So.2d 1069 (Fla. 1987).

This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case, as the petition pleads claims involving fundamental constitutional error. Dallas v. Wainwright, 175 So.2d 785 (Fla. 1965); Palmer v. Wainwright, 460 So.2d 362 (Fla. 1984). Thus, the Court's exercise of its habeas corpus jurisdiction and of its authority to correct constitutional errors, such as

those plead herein, is warranted.

GROUNDS FOR HABEAS CORPUS

By his petition for a Writ of Habeas Corpus, Mr. Bell asserts that his capital conviction and sentence of death were obtained, then subsequently affirmed by this Court during the Appellate process, in violation of his rights as guaranteed by the Fourth, Fifth, Sixth, Eight, and Fourteenth Amendments to the United States Constitution and the corresponding provisions.

CLAIM I

MR. BELL WAS DENIED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IN VIOLATION OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS, AS GUARANTEED BY THE UNITED STATES CONSTITUTION.

Whether Mr. Bell was denied his right to effective assistance of Appellate counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution. This claim is evidenced as set out below.

Mr. Bell hereby alleges Appellate counsel, Mr. W.C. McClain, failed to properly research, prepare, and present the issue of whether the trial court erred in failing to make an adequate inquiry into Appellant's pretrial complaints of ineffective assistance of counsel and his request for appointment of substitute counsel. During the pretrial proceeding on January 3, 1995, Mr. Bell unequivocally invoked his Sixth Amendment Right to self-representation. TR at page 23, lines 20-22). Bell specifically stated, "I have ineffective assistance of counsel. I would like to get another counsel appointed to me or either represent myself."

Because Mr. Bell unequivocally invoked his right to self-representation, a Faretta inquiry was held. On January 4, 1995, Mr. Bell was advised of the dangers of self-representation. However, Judge Oliff ruled that Mr. Bell lacked sufficient legal knowledge to represent himself. Further, the trial court concluded Mr. Bell was "not competent to represent himself, or as co-counsel", and compelled Mr. Bell to proceed to trial with an attorney that he believed to be ineffective. Further, on

January 4, 1995, Mr. Bell wrote a letter to Judge Oliff, wherein he again unequivocally stated his displeasure with counsel, and reiterated his desire to represent himself. (TR. Page 27, and PCR Vol. 2, page 255, and PCR Vol. 4, page 695).

Mr. Bell's Appellate counsel failed to properly research the pretrial, and trial, records to locate these citations. As a result, during oral arguments to this Court held on December 6, 1996, this Honorable Court asked Appellate counsel six (6) times, "At any time did Mr. Bell ever ask to represent himself?" Mr. Bell's Appellate counsel, Mr. McClain, never answered the Court's question. This Honorable Court then inquired of the Assistant Attorney General, whether Mr. Bell had ever asked to represent himself, to which she also failed to correctly respond. Subsequently, this Honorable Court denied Claim I, of Mr. Bell's direct appeal, and stated in pertinent part that: ". . . at no time during any proceedings did Appellant request to act alone as his own counsel. Bell v. State, 699 So.2d 674, 677 (1997). Accordingly, this Honorable Court's opinion in Mr. Bell's case was based upon insufficient information, due to Appellate counsel's failure to respond to this Honorable Court. The record cite, and verbatim text of Mr. Bell's request for new counsel, was made during proceedings in which Mr. Bell explicitly stated he wanted to represent himself if counsel was not substituted. (TR page 23 lines 20-27).

The U.S. Supreme Court has opined that the Appellate lawyer must master the trial record. McCoy, 486 U.S. _ 108 S.Ct. _, 1902, 100 L.Ed 2d 453. Because Appellate counsel failed to provide this Honorable Court with sufficient record facts, he failed to

master the record. This failure caused this Honorable Court to erroneously conclude that "the context of the entire hearing concerned Appellant's complaints about his counsel's representation . . . rather than any potential assertions of a right to self-representation". Bell v. State, 699 So.2d 674, 677 (1997). Therefore, Mr. McClain was ineffective and defendant was greatly prejudiced as a result. Matire v. Wainwright, 811 F.2d 1430 (11th Cir. 1987).

In Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525 (1975), the U.S. Supreme Court's holding therein made it clear that a defendant in a state criminal trial has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so, and that the state may not force a lawyer upon him when he insists that he wants to conduct his own defense. Id. Here, Appellate counsel deprived Mr. Bell of his constitutional right to self-representation, because he failed to inform this Honorable Court that Mr. Bell had voluntarily and intelligently invoked his constitutional right to counsel as set out in the trial record and noted above. Appellate counsel's erroneous omission of crucial record facts was so serious that Appellate counsel was not functioning as the "counsel guaranteed to Mr. Bell by the Sixth Amendment." Had Appellate counsel informed this Honorable Court that the trial record clearly demonstrated that Mr. Bell invoked his right to self-representation; there is a reasonable probability the outcome of Mr. Bell's direct appeal would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland v. Washington,

466 U.S. 668, 694 (1984).

Not only was Appellate counsel's assistance ineffective, the same was unreasonable, because he failed to meet prevailing professional norms of Appellate practice. Further, his erroneous omission of crucial record facts prejudiced the outcome of Mr. Bell's direct appeal proceedings. As a result of said omission, this Honorable Court was deprived of the critical fact that Mr. Bell had clearly, and unequivocally, stated a desire to invoke his constitutional right of self-representation, which precluded a fair adjudication of Mr. Bell's Faretta claim on direct appeal. Orazio v. Dugger, 876 F.2d 1508, 1513, (11th Cir. 1989).

In Strickland vs. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2068, (1984), the U.S. Supreme Court stated that an ineffective assistance of counsel claim has two components: a performance inquiry and a prejudice inquiry. First, a defendant must show that counsel's performance was deficient. Second, the defendant must show that the deficient performance prejudiced the defense. This standard of review is also applicable to Appellate counsel. Orazio v. Dugger, 876 F.2d 1508, 1513, (11th Cir. 1989). The performance inquiry must be whether counsel's assistance was reasonable considering all of the circumstances. The prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached was reasonably likely to have been different absent the errors. Strickland v. Washington, 466 U.S. 668, 688, 696 (1984).

As stated in the foregoing discussion, the acts and omissions by Mr. Bell's

Appellate counsel was not reasonable under the circumstances. Appellate counsel knew of Mr. Bell's choice to represent himself as stated in his letter to Mr. Bell dated August 19, 1997. In said letter, the "key issue" is the trial court's failure to allow Mr. Bell to choose to represent himself. Appendix I. Therefore, omission of such crucial material fact, even when he apparently knew of it, thereby satisfying the performance claim. Further, said omission resulted in Mr. Bell not receiving a fair Appellate adjudication of Claim I, on direct appeal. Hence, he is prejudiced, because had this omission not occurred, it is reasonably likely the outcome would have been different. Therefore, Appellate counsel's conduct so undermined the proper functioning of the adversarial process that the direct appeal cannot be relied upon to have produced a just result. Strickland v. Washington, 466 U.S. 668, 686, (1984).

Mr. Bell made a layman request to invoke his constitutional right to self-representation, and subsequently the trial court conducted a flawed Farretta inquiry, and found that Mr. Bell lacked knowledge of Court rules, and was therefore not competent to serve as co-counsel or counsel. Bell v. State, 699 So.2d 674, 677 (1997). Mr. Bell's sole request to represent himself was sufficient to preserve this legal claim for review by this Honorable Court. Orazio v. Dugger, 876 F.2d 1508, 1512-1513, (11th Cir. 1989).

For the foregoing reasons, Mr. Bell respectfully requests that this Honorable Court correct the error by ordering a new trial. A new appeal would be meaningless when the

error complained of relates to errors that occurred at trial. Johnson v. Wainwright, 498 So.2d 938 (Fla. 1986).

CLAIM II

A FUNDAMENTAL ERROR OCCURRED DURING JURY SELECTION. APPELLATE COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO RAISE FUNDAMENTAL ERROR THAT OCCURRED DURING JURY SELECTION ON DIRECT APPEAL.

That during the jury selection process, a prospective black juror named Mr. George Dawson testified in voir dire that he had served on a juror panel previously. (TR page 84). Looking at the record on appeal, his testimony did not show bias, prejudice, lack of impartiality, or express a genuine reservation about his preconceived opinion or attitude. It was clear that he was willing to render an impartial verdict based on the evidence and instruction. (TR page 115 and 218).

However, the prosecutor made a motion to excuse Mr. Dawson for cause, stating that Mr. Dawson "seemed to be a little retarded" (TR page. 229). Mr. Bell's trial attorney agreed, and then the trial court excused Mr. Dawson for cause. (TR page 229). This striking of juror Dawson was a fundamental error. In evaluating juror's qualifications, a trial court should evaluate all questions and answers posed to, or received from a juror. Parker v. State, 641 So.2d 369 (Fla. 1994). The reason announced by the State, agreed to by trial counsel, and accepted by the Court is not justified by F.S. 913.03 or 913.13.

It is well settled that jurors are automatically excluded by the clerk for illness or disabilities. The mere uneducated allegation of the prosecutor does not constitute the type

of physical infirmities required by Section 40.01, Fla. Statutes. There is no record evidence that Mr. Dawson was actually retarded. This reason to excuse Mr. Dawson is not supported by the record. Not only is there no evidence of retardation, the only evidence is that he was competent to serve as a juror previously. Therefore, Mr. Bell's conviction should be reversed. Not only is there no evidence of retardation, the only evidence is that he was competent to serve as a juror previously. Gore v. State, 706 So.2d 1328, (Fla. 1997), State v. Slappy, 522 So.2d 18,23 (Fla. Cert. Denied), 108 S.Ct. 2873, 101 L.Ed 2d 909 (1988). The test for whether a prospective juror is subject to dismissal for cause involves whether or not the prospective juror can set aside all other considerations and render his verdict solely upon evidence presented, and instruction on law given to him by Court. Smith v. State, 699 So.2d 629 (Fla. 1997).

The State failed the Smith, Adams and Witt test. The State did not show that the juror could not follow the law and the Court's instruction and put his personal feelings aside. This fundamental error does not need any factual development or an evidentiary hearing, because the record fully explains this issue. Therefore, Mr. Bell's Appellate counsel, Mr. McClain, was ineffective when he failed to raise this claim on Mr. Bell's direct appeal. This Court has noted that claims of ineffective assistance of counsel can sometimes be raised on direct appeal and sometimes succeed. Foster v. State, 387 So.2d 344 (Fla. 1980), cert. denied 464; U.S. 1052. This is especially so when the facts giving rise to the claim are apparent on the face of the record. Fasano v. State, 548 So.2d 1191

(Fla. 4th DCA 1989). Mr. Bell's direct appeal counsel, Mr. McClain's, failure to raise this claim on Mr. Bell's direct appeal was ineffective assistance of counsel. Spaziano v. State, 522 So.2d 525 (Fla. App. 2nd District 1988). Therefore, the conviction and sentence of death should be vacated and set aside.

CLAIM III

MR. BELL WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL WHEN HIS COUNSEL FAILED TO RAISE MR. BELL'S RIGHT TO BE PRESUMED INNOCENT. THE COURT ALLOWED DEFENDANT TO BE VIEWED IN SHACKLES AND CHAINS.

The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment. Drape v. Missouri, 420 U.S. 162, 172, 95 S.Ct. 896, 904 (1975). At the core of the right to a fair trial lies the presumption of innocence, a basic component of a fair trial under our system of criminal justice. Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691 (1976). The United States Supreme Court recognized in Estelle, that to implement said presumption, Courts must be alerted to factors that may undermine the fairness of the fact finding process. One factor the Court found which could cause impairment of this presumption was the appearance before a jury of a defendant in shackles, gags or prison clothing. Noting that such an appearance might have a significant effect of the jury's feelings about the defendant, the Court held that the defendant should not unnecessarily be compelled to appear before a jury in such a condition. Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057 (1970).

In the instant case, Mr. Bell wore "jail clothes" during his entire day long voir dire. Mr. Bell presented before the jury panel with a big label on the front of his shirt and pants containing the words "Duval County Jail". Mr. Bell had previously told his attorney, Richard Nichols, that he wanted to wear his own clothes at trial and Mr. Nichols told Mr. Bell that he would arrange for Mr. Bell to wear his own clothes.

However, before trial began, Mr. Nichols had not made the proper arrangements. It is well settled that this is a duty every trial counsel assumes and must uphold. Mr. Bell informed the trial Judge about the clothing situation, which resulted in a hearing on the matter. (TR page 62-64). The bailiff of the Court explained to Judge Oliff that Mr. Bell did not want to wear dirty clothes provided by the Public Defender, as the clothes had a foul, offensive odor. (TR page 62). Judge Oliff committed fundamental error when he told Mr. Bell that he had a "choice" to either wear the jail clothes, or the clothes provided by the Public Defender, as it made no difference to him. (TR page 62). A fair trial should always matter to a trial court. Mr. Bell then told Judge Oliff that he wanted to wear his own clothes, but needed to use the phone to have a family member bring them to him, because he had been prevented from using the phone in the jail to make said call. (TR page 63). Judge Oliff further erred when he said he would waive Mr. Bell's presence during jury selection, without properly advising Mr. Bell of the inherent danger of being absent during jury selection or of wearing jail clothes. Mr. Nichols told Judge Oliff that Mr. Bell had indicated to him that rather than being absent during jury selection he would wear his jail clothes. (TR page 63-64). The Court then proceeded with jury selection.

It is not disputed that Mr. Bell has a fifth grade education and could not be fully aware of what his rights to a fair trial consisted of. Mr. Nichols and the trial Judge did not properly advise Mr. Bell of the inherent dangers of the choices forced upon him. (TR

page 62). Mr. Nichols and the Court had a duty explain to Mr. Bell his right not to appear at trial in prison clothes. More importantly, they had the duty to explain how the jury would view him in jail clothes, and how the wearing of jail clothes would effectively waive Mr. Bell's fundamental right to presumption of innocence. The Sixth Amendment of the United States Constitution embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty. Especially where the prosecution is represented by experienced and learned counsel. Issues that are simple, orderly and necessary to an experienced trial attorney may appear intricate, complex, and mysterious to the untrained layman, if recognized at all. The trial Judge erred by placing Bell in this position. What makes this error so glaring is the fact that the trial court had already ruled Bell was incompetent to proceed as counsel, or even co-counsel. Therefore, this Court could not then expect him to be competent to make this critical decision. The trial court simply cannot have it both ways.

The purpose of the constitutional guarantee of a right to counsel is to protect an accused from a conviction resulting from his own ignorance of his legal and constitutional rights. The trial court's fundamental error, combined with Mr. Nichols deficient performance, deprived Mr. Bell of his fundamental right to the presumption of innocence. Hernandez v. Beta, 443 F.2d 634 (1971). The Court in Palmer vs. State, 831 So.2d 725 (Fla. App. 4th District 2002), held that the movant stated sufficient claim that the

Court erred, and trial counsel rendered ineffective assistance by allowing him to wear identification prison clothing. This issue should have been raised on appeal and Appellate counsel's failure to do so was ineffective assistance of counsel.

Mr. Bell was entitled to have the jury reach its verdict based solely on the evidence presented to them in Court, and not to have its decision affected by the emotion generated by observing Mr. Bell in his jail clothes. In re: Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970). The jury seeing Bell in jail clothes waived Mr. Bell's presumption of innocence, and it leaves the jury with the obvious concern for Mr. Bell's propensity for violence and lack of ability to respond to authority. These factors may have reasonably lead the jury to convict and to recommend the death sentence Mr. Bell received. Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987); Bello v. State, 547 So.2d 914 (Fla. 1989). Especially, combined with the totality of the circumstances enumerated herein and on direct appeal.

Under the circumstances, the trial court had an obligation to ensure the right to a fair trial guaranteed to Mr. Bell. The Court's failure to do so deprived Mr. Bell of the rights guaranteed him by the Fourteenth Amendment. Lastly, it is clear that the two prong test for ineffective assistance of counsel has been met as well. It is reasonably likely that had the issue of the jail clothes been raised on direct appeal, the outcome would have been different. Mr. Bell was prejudiced by Appellate counsel's failure to raise the foregoing claim on direct appeal, resulting in fundamental error. Accordingly, a

new trial is should be granted, and the conviction and sentence set aside.

CLAIM IV

MR. BELL WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL TO THE FLORIDA SUPREME COURT AS REQUIRED BY THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9, 16(2) AND 17 OF THE FLORIDA CONSTITUTION BY THE TRIAL COURT APPOINTING THE PUBLIC DEFENDER'S OFFICE TO ASSIST ON DIRECT APPEAL.

On September 15, 1994, the Fourth Judicial Circuit, the Public Defender's office was appointed to represent Mr. Bell. Later, the trial court ruled a conflict of interest existed with the Fourth Judicial Circuit, Public Defender's office. (TR page 8). Therefore, the Public Defender's office could not represent Mr. Bell and timely withdrew from any and all representation. The trial court thereafter appointed a private attorney, Richard Nichols, to represent Mr. Bell. (TR page 8). Mr. Bell was tried, convicted, and sentenced to death.

However, on July 5, 1995, the Fourth Judicial Circuit, Public Defender's office filed a Notice of Appearance and continued to file numerous pleadings in Mr. Bell's case until April 1, 1996, despite knowledge of a conflict. The Canons of Professional Ethics of the American Bar Association provides it is improper to undertake representation knowing a conflict exists. Wood v. Georgia, 450 U.S. 261, 101 S.Ct. 1097, 677 L.Ed 2d 220 (1981). The Fourth Judicial Circuit, Public Defender's office filed a motion for statement of judicial acts to be reviewed on July 13, 1995. Because of the known conflict of interest, that office was not involved in Mr. Bell's trial. Therefore, that office could only speculate as to which issues were preserved for appeal. That office did not discuss the issues preserved by Mr. Bell's trial attorney, Mr. Nichols, and was unable to discuss the issues with Mr. Bell, due to the conflict.

On direct appeal, many of Mr. Bell's viable claims were not raised by his Appellate counsel. The prejudice suffered can be seen unequivocally in the trial court's Order

denying defendant's post conviction 3.850 motion, wherein the trial court held that the following claims should have been raised by Mr. McClain on Mr. Bell's direct appeal. Looking to the trial court's Order we find at:

Page 8 Claim I (F), failure to object to the prosecutor's improper comment: "this Court will note that this claim is procedurally barred in that it could and should have been raised on direct appeal. Cherry v. State, 659 So.2d 1069 (Fla. 1995). Straight v. State, 488 So.2d 530 (Fla. 1986), Defendant may not seek to avoid this procedural bar by couching his claim in terms of ineffective assistance of counsel. Arbelaez v. State, 775 So.2d 909, 915 (Fla. 2000);

At Page 18-19, Claim I (N), trial counsel failure to assist state mental health expert: "such assertions are procedurally barred in that they could and should have been raised on direct appeal". Cherry; Straight;

At Page 27, Claim III, improper aggravating factor: "this Court finds that the instant claim is procedurally barred in that it could have been raised on direct appeal. Porter v. State, 788 So.2d 919, 921 (Fla. 2001), Cherry; Straight;

At Page 27, Claim IV, improper jury instruction: "this claim is procedurally barred in that it could and should have been raised on direct appeal. Cherry, Straight, Defendant may not seek to avoid this procedural bar by couching his claim in terms of ineffective assistance of counsel. Arbelaez, Cherry;

At Page 28, Claim V, prosecutor diverted the jury from its duty: "this Court finds

that the instant claim is procedurally barred in that it could and should have been raised on direct appeal. Cherry, Straight;

At Page 28, Claim VI, misleading jury instructions: "This Court finds that this claim is procedurally barred in that it could and should have been raised on direct appeal. Owen v. State, 773 So.2d 510, 515 n.11 (Fla. 2000); Cherry;

At Page 28-29, Claim VII, improper jury strike: "This claim is procedurally barred in that it could and should have been raised on direct appeal. Cherry; Straight, Defendant may not seek to avoid this procedural bar by couching his claim in terms of ineffective assistance of counsel. Arbeleoz, Cherry, Chandler, Lopez;

At Page 29, Claim VIII, prosecutor violated Brady v. Maryland, "this Court will note that, the instant claim is procedurally barred in that it could and should have been raised on direct appeal. Rose v. State, 675 So.2d 567, 569, n.1. (Fla. 1996); Cherry, Straight;

The foregoing failure of Appellate counsel to raise the issues discussed above constitutes ineffective assistance of counsel. Mr. McClain's performance fell below that which is expected of competent counsel, which prejudiced Mr. Bell's outcome of his direct appeal. Accordingly, Mr. Bell respectfully requests this Honorable Court to grant him a new trial with competent counsel, and if necessary, appropriate Appellate counsel.

CLAIM V

THE TRIAL COURT GAVE AN INACCURATE JURY INSTRUCTION THAT WAS MISLEADING AND CONFUSING WHICH IS REVERSIBLE ERROR. APPELLATE COUNSEL'S FAILURE TO RAISE THIS FUNDAMENTAL ERROR ON DIRECT APPEAL WAS INEFFECTIVE ASSISTANCE OF COUNSEL ENTITLING DEFENDANT TO A NEW TRIAL.

The trial court has the responsibility to fully and correctly instruct the jury on the applicable law. Foster v. State, 603 So.2d 1312 (Fla. 1st DCA 1992). In the instant case,

the trial Judge failed to do so, depriving the jury of a full and fair opportunity to acquit Mr. Bell on the basis of the evidence tendered in support of his defense. Though trial counsel was ineffective in presenting evidence, there was substantial evidence in this case supporting his defense. (TR page 558). After the close of all evidence presented in trial, the following instructions were given to jury:

1. Excusable Homicide

The killing of a human being is excusable, and therefore lawful, under any of the following three circumstances:

1. When the killing is committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution and without any lawful intent;
2. When the killing occurs by accident and misfortune in the heat of passion, upon any sudden combat, <u>if a dangerous weapon is not used</u> and the killing is not done in a cruel or unusual manner.
3. When the killing is committed by accident and misfortune resulting from a sudden combat, <u>if a dangerous weapon is not used</u> and the killing is not done in a cruel or unusual manner.

   <u>Dangerous weapon is any weapon</u> that taken into account the manner in which it is used is likely to produce death or great bodily harm. (TR page 57).

2. Manslaughter

1. Jimmy West and/or Tamecka Smith are dead.

2. (A). Michael Bell intentionally caused the death of Jimmy West and/or Tamecka Smith; or

(B). The death of Jimmy West and/or Tamecka Smith was caused by culpable negligence of Michael Bell.

However, the defendant cannot be guilty of manslaughter if the killing was either justifiable or excusable homicide as I have previously explained those terms. I will define "culpable negligence" for you. Each of us has a duty to act reasonable towards others. If there is a violation of that duty, without any conscious intention to harm, that violation is negligence. But culpable negligence is more than a failure to use ordinary care toward others. In order for negligence to be culpable, it must be gross and flagrant. Culpable negligence is a course of conduct showing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects, or such an entire want of care as to raise a presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard to the safety and welfare of the public, or such an indifference to the rights of others as is equivalent to an intentional violation of such rights.

The negligent act or omission must have been committed with an utter disregard for the safety of others. Culpable negligence is consciously doing an act or following a

course of conduct that the defendant must have known, or reasonably should have known, was likely to cause death or great bodily harm.

In order to convict of manslaughter by intentional act, it is not necessary for the State to prove that the defendant had a premeditated intent to cause death. (TR page 61).

The trial court gave these misleading instructions which could have caused the jury to conclude that defendant's use of a dangerous weapon, in an altercation not classified as sudden combat, precluded the defense of excusable homicide. This could cause the jury to incorrectly conclude that during the instruction phase "without any dangerous weapon" was being used to qualify the entire instruction. Blitch v. State, 427 So.2d 785, 787 (Fla. 2nd DCA 1983). The instruction, if read properly, would have given the jury an alternative basis to judge defendant's culpability. The context of the erroneous jury instruction was critical, because of the defendant's use of "self defense" at trial.

These same misleading instructions were held to be fundamental reversible errors in Alego v. State, 483 So.2d 117 (Fla. 2nd DCA 1986). In Alego, the Second DCA noted that [c]ourts have consistently held that an instruction defining justifiable and excusable homicide is necessary to provide a complete instruction on the crime of manslaughter. Id. at 118.

Further, both the Second and Fourth DCA have stated that these instructions are incomplete, resulting in reversible error. Spaziano v. State, 522 So.2d 525 (Fla. App. 2nd District 1988); Hoffert v. State, 559 So.2d 1246 (Fla. App. 4th District 1990); Evans v.

State, 572 So.2d 20 (Fla. DCA 4th District 1990); Cummings v. State, 648 So.2d 166 (Fla. App. 4th District 1994); Blitch v. State, 427 So.2d at 787.

The long form Florida Standard Jury Instruction on excusable homicide contains a marginal note which instructs a trial Judge to charge the jury with only those elements of the instruction as may be applicable to the evidence. However, the Court's instruction in this case illustrates the inadequacy of this direction. The giving of this instruction promotes the opportunity for the jury to exercise its inherent pardon power. State v. Abreau, 363 So.2d 1063 (Fla. 1978). The failure to do so is fundamental error.

Mr. Bell's rights were violated under the Eighth and Fourteenth Amendments, to the extent the trial counsel did not properly preserve this claim and actually agreed to the misleading instructions. (TR page 550). Further, at trial when they were read to the jury, trial counsel's failure to object was an unreasonable omission which severely prejudiced Defendant's case, because the error complained of negated the only defense put forth by trial counsel. Carter v. State, 469 So.2d 194 (Fla. 2nd DCA 1985). Appellant recognizes that the mere failure of Mr. Nichols to object to an incomplete instruction does not constitute an affirmative waiver. Nelson v. State, 679 So.2d 1249 (Fla. 4th DCA 1996). But, his failure to object, both at the charge conference and when the instructions were read, was the result of mistake or negligence such that his conduct fell measurably below the standard of competent counsel. Strickland v. Washington, 466 U.S. 668, 687-688, 104 S.Ct. 2052, 2064, 80 L.Ed. 2d 674 (1984). Steel v. State, 684 So.2d 290 (Fla. 4th

DCA 1996). Mr. Nichols did not take into account the defense posture of this case, when he failed to request the long form instruction, thereby allowing his omission to exclude the defense presented at trial. This could not have reasonably been a trial strategy. There is a reasonable probability that the result of the verdict would have been different if Mr. Nichols omission would not have occurred. Strickland, 104 S.Ct. at 2068 (1984).

Appellate counsel failed to bring this fundamental error to the attention of the Court on direct appeal, which is ineffective assistance of counsel. Spaziano v. State, 522 So.2d 525 (Fla. App. 2nd District 1988). The same misleading instruction that was given in Spaziano, was given in Mr. Bell's case. The relief requested is appropriate because it is consistent with what the Court found to be ineffective assistance of counsel in Spaziano. It follows that this Court should find ineffective assistance of Appellate counsel in this case, because counsel did not raise the same issues on direct appeal.

CLAIM VI

APPELLATE COUNSEL'S FAILURE TO BRING ERROR TO THE ATTENTION OF THE COURT ON DIRECT APPEAL. THAT DUE TO STATEMENTS OF THE PROSECUTOR MR. BELL'S JURY ATTACHED DIMINISHED CONSEQUENCES TO THEIR VERDICT VIOLATED THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

During voir dire, the Assistant State Attorney, George Bateh, made the following statement to the jury, "you must understand that the jury no matter what the jury recommends, jury can recommend life, and the Judge can impose death, and the reverse is true, the jury could recommend life and the Judge could." (TR page 212).

Trial counsel objected twice to the foregoing statement. However, the objection, was overruled. (TR page 213). In Prevatte v. State, 214 S.E. 2d 365, the court held that this statement, regarding the right of the trial court to impose a life sentence even if the jury recommended death, had the inevitable effect of encouraging the jury to attach diminished consequences to their verdict, and to take less than full responsibility for their awesome task of determining life or death for prisoners before them, reversal of the sentence is then required.

In Mr. Bell's case, the jury heard the prosecutor's statement which had the inevitable effect of encouraging the jury to attach a diminished consequence to their verdict, and to assume less than full responsibility for their verdict. Thereby, violating Mr. Bell's Eighth Amendment right to the United States Constitution.

This violation of Mr. Bell's rights was further aggravated by Appellate counsel's

failure to raise this statement by the prosecutor on direct appeal. Said statements by the prosecutor were fundamental error and should have been raised by Appellate counsel. Accordingly, relief for a new trial should be granted.

CLAIM VII

FLORIDA LAW DEPRIVED MR. BELL OF HIS SIXTH AMENDMENT RIGHT TO HAVE ALL ELEMENTS OF HIS CRIME TO A FULL AND FAIR TRIAL BEFORE A JURY. MR. BELL'S APPELLATE COUNSEL FAILED TO RAISE THIS ISSUE ON DIRECT APPEAL THUS THE SAME WARRANTS REVIEWED AS ARGUED BELOW.

The constitutionality of a First Degree Murder indictment, and conviction, must be viewed in light of the United State's Supreme Court's holding in Apprendi v. New Jersey, 120 S.Ct. 2348 (2000), wherein the Supreme Court held that, other than the issue of a prior criminal conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proven beyond a reasonable doubt. Id. at 2362-2363. The constitutional underpinning of the Apprendi holding is 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 prescription of any deprivation of liberty without due process of law. The Fourteenth Amendment guarantees that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury. Before depriving a United States citizen of life or liberty, a criminal defendant should be entitled to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.

Pursuant to State v. Dixon, 283 So.2d 19 (Fla. 1973), the statutory aggravating circumstances enumerated in Florida Statute 921.141 have been held to define the

elements of a capital crime. Further, under the Sixth and Fourteenth Amendments, all aggravating circumstances must be alleged in the indictment. Jones v. United States, 526 U.S. 227 (1999); Apprendi v. New Jersey, 530 U.S. 466 (2000). As in Apprendi, the aggravating sentencing factors in Mr. Bell's case, became an issue only after he was found guilty, thus, the statutory maximum penalty, from life imprisonment to death. 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. Statute §921.141(1)(2)(1981). Walton v. Arizona, 497 U.S. 639, 648 (1990).

Because the State did not allege the aggravating factors in the indictment, and because the aggravating factors did not have to be proven beyond a reasonable doubt, Mr. Bell's conviction must be vacated and his death sentence set aside.

CLAIM VIII

THE FLORIDA STATUTE 921.141(5) IS FACIALLY VAGUE AND OVERBOARD IN VIOLATION OF THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS. THE JURY DID NOT RECEIVE ADEQUATE GUIDANCE IN VIOLATION OF AMENDMENTS. MR. BELL'S DEATH SENTENCE IS PREMISED ON FUNDAMENTAL ERROR WHICH MUST BE CORRECTED.

Under Florida Law, a capital sentencing jury must be told that the State must establish the existence of one or more aggravating circumstances before the death penalty can be imposed. Such a sentence can only be given if the State proves the aggravating circumstances outweighed the mitigating circumstances. Dixon v. State, 283 So.2d 1 (Fla. 1973). Mr. Bell's jury was instructed, if they find that sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating and mitigating circumstances. Said instruction was error and Appellate counsel failed to raise the issue on direct appeal.

Mr. Bell's sentencing jury was instructed that it could consider felony murder aggravating circumstances. Because he had been convicted of robbery, Mr. Bell was automatically eligible for death upon conviction. Thus, Mr. Bell entered the penalty phase of his capital trial with the burden of proving he should live and not die. This unconstitutional burden shifting violated Mr. Bell's due process and Eighth Amendment rights. Sandstrom v. Montana, 442 U.S. 510 (1979). Jackson v. Dugger, 837 F.2nd 1469 (11th Cir. 1988). The jury was not instructed in conformity with the standard set forth in Dixon. The instructions essentially told the jury that once aggravated

circumstances were established, it need not consider mitigating circumstances unless those mitigating circumstances were sufficient to outweigh the aggravating circumstances. Mill v. Maryland, 108 S.Ct. 1860 (1988), Hitchcock v. Dugger, 481 U.S. 393 (1987).

This error was not harmless. Mr. Bell entered the penalty phase with an unconstitutional "automatic aggravating factor" that applies to every felony murder. That simply fails to "genuinely narrow the class of persons eligible for the death penalty, and therefore, the sentencing process was rendered unreliable. Zant v. Stephens, 462 U.S. 862, 876 (1983). The unconstitutional instructions precluded the jurors from considering the mitigating evidence that was presented, in violation of Hitchcock, and from evaluating the totality of the circumstances. State v. Dixon, 283 So.2d at 10; Hitchcock v. Dugger, 481 U.S. 393 (1987). The jurors would reasonably have understood that only mitigating evidence which rose to the level of "outweighing" aggravation need be considered. Bell's Appellate counsel failed to raise this fundamental error on direct appeal. Therefore, at minimum, Mr. Bell is entitled to relief in the form of a new sentencing hearing in front of a jury because his sentence was tainted by improper jury instructions.

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the Attorney General, The Capitol, PL-01, Tallahassee, Florida 32399-1050, by U.S. Mail this 1st day of April, 2005.

_____

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Writ of Habeas Corpus is typed in Times New Roman font, and is font size 14.

_____

RICHARD R. KURITZ, ESQUIRE