IN THE SUPREME COURT OF FLORIDA

CASE NO.

HARRY JONES,

Petitioner,

v.

JAMES MCDONOUGH,

Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This is Mr. Jones' first habeas corpus petition in this Court. Art. 1, Sec. 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, claims demonstrating that Mr. Jones was deprived of the right to a fair, reliable, and individualized sentencing proceeding and that the proceedings resulting in his convictions and death sentence violated fundamental constitutional imperatives.

Citations shall be as follows:

"R. ___." The record on direct appeal.

"TT. ___." The trial transcript.

"PC-R. ___." The post-conviction record on appeal.

All other references will be self-explanatory or otherwise explained herein.

PROCEDURAL HISTORY

On June 25, 1991, Mr. Jones was charged by information with second-degree murder, robbery, and grand theft of a motor vehicle (R. 4-5) On July 18, 1991, Mr. Jones charged by superceding indictment with first-degree murder, robbery, and grand theft of a motor vehicle. (R. 1-2) Mr. Jones entered a plea of not guilty. (R. 18-20) Mr. Jones was tried by jury in May, 1992. The jury was unable to reach a verdict and a mistrial was declared. Mr. Jones was tried again in November 1992 and the jury returned verdicts of guilt on all charges. (R. 786-90) The jury recommended death by a vote of 10-2. (PC-R. 93) The trial court sentenced Mr. Jones to death on November 20, 1992. (R. 828-36) Mr. Jones timely sought direct appeal to this Court. (PC-R. 149-50) This Court affirmed Mr. Jones' convictions and death sentence. Jones v. State, 648 So.2d 669 (Fla. 1994). The United States Supreme Court denied certiorari. Jones v. Florida, 515 U.S. 1147 (1995). Mr. Jones filed a post-conviction shell motion on March 21, 1997. (PC-R. 235-47) Mr. Jones filed an amended post-conviction motion on March 19, 2003. (PC-R. 468-573). A Huff[1] hearing was held in the matter on January 16, 2004. The trial court granted an evidentiary hearing as to the majority of sub-claims in Claims I-IV of Mr.

[1] Huff v. State, 622 So.2d 982 (Fla. 1993)

Jones' amended motion. The court withheld consideration of Claim XIII (cumulative error) until the conclusion of the evidentiary hearing. An evidentiary hearing was held in this matter on April 15-16, 2004. (PC-R. 85-86) Both Mr. Jones and the state submitted post-hearing written argument. (PC-R. 767-834) On April 11, 2005, Mr. Jones filed a supplemental 3.851 motion averring that a witness would testify that trial witness Kevin Prim stated that he testified falsely at Mr. Jones' trial. (PC-R. 888-911) On September 23, 2005, the trial court entered two separate orders denying relief as to Mr. Jones' amended post-conviction motion. (PC-R. 926-1103) One order dealt with claims summarily denied and the other dealt with claims for which an evidentiary hearing was granted. Mr. Jones sought timely appeal. (PC-R. 1104-05) Simultaneously with this Petition, Mr. Jones has filed a brief appealing the denial of his post-conviction motion.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). See Art. 1, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of

this Court during the appellate process, and the legality of Petitioner's convictions and sentences of death.

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

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

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Jones asserts that his capital convictions and sentence of death were obtained in violation of his rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

In these Grounds, Mr. Jones alleges that appellate counsel was ineffective in failing to raise these issues on direct appeal. Appellate counsel was ineffective in failing to raise these arguments on direct appeal. Petitioner's claim of ineffective assistance of appellate counsel is properly raised in this petition. Freeman v. State, 761 So.2d 1055, 1069 (Fla. 2000). The standard for relief on a claim such as this is the same as Strickland v. Washington, 466 U.S. 668 (1984). Henyard v. State, 883 So.2d 753 (Fla. 2003). That is,

> whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.

Id at 764. see also Freeman; Pope v. Wainwright, 496 So.2d 798 (Fla. 1986); Thompson v. State, 759 So.2d 650 (Fla. 2000).

Given the prevailing nature of the issues raised herein, appellate counsel should have been acutely aware. Failing to raise the issues in Mr. Jones' direct appeal to this Court resulted in the prejudice thus demonstrated. A new trial, sentencing, or both are warranted.

GROUND I

FLORIDA STATUTE § 921.141 VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, AND RING V. ARIZONA.[1]

Florida's Capital Sentencing Scheme is Unconstitutional under Ring v. Arizona

The holding of Ring

Ring v. Arizona, 122 S.Ct. 2428 (2002), held unconstitutional a capital sentencing scheme that makes a death sentence contingent upon finding an aggravating circumstance and assigns responsibility for finding that circumstance to the judge. The Supreme Court based its Ring holding on its earlier decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), where it held that "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." Id. at 490 (quoting Jones v. United States, 526 U.S. 227, 252-53 (1999) (Stevens, J., concurring)). Capital

[1] Mr. Jones takes the opportunity at the outset of this claim to acknowledge that this claim was not raised at trial or on direct appeal to this Court. Further, Mr. Jones acknowledges the United States Supreme Court's opinion in Schiro v. Summerlin, 543 U.S. 348 (2004). In that opinion, the Court held that Ring is not retroactively applicable to cases already final on direct appeal. Mr. Jones also acknowledges this Court's opinion in Johnson v. State, 904 So.2d 400 (Fla. 2005).

sentencing schemes such as Florida's and Arizona's violate the notice and jury trial rights guaranteed by the Sixth and Fourteenth Amendments because they do not allow the jury to reach a verdict with respect to an "aggravating fact [that] is an element of the aggravated crime" punishable by death. Ring at 2439. (quoting Apprendi, 530 U.S. at 501 (Thomas, J., concurring)).

Applying the Apprendi test in Ring, the Court said "[t]he dispositive question . . . 'is not one of form but of effect.'" Ring at 2439 (quoting Apprendi, 530 U.S. at 494). The question is not whether death is an authorized punishment in first-degree murder cases, but whether the "facts increasing punishment beyond the maximum authorized by a guilty verdict standing alone," Ring at 2441, are found by the judge or jury. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact . . . must be found by a jury beyond a reasonable doubt." Ring at 2440. "All the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury." Id. (quoting Apprendi at 499 (Scalia, J., concurring)).

The Court in Ring held that Arizona's sentencing statute could not survive Apprendi because "[a] defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty." Ring at 2440. Thus, the Court overruled Walton v. Arizona, 497 U.S. 639 (1990), "to the extent that it allows a sentencing judge sitting without a

jury, to find an aggravating circumstance necessary for imposition of the death penalty." Ring at 2443.

Application of Ring to Florida's sentencing scheme

This Court has previously held that, "[b]ecause Apprendi did not overrule Walton, the basic scheme in Florida is not overruled either." Mills v. Moore, 786 So.2d 532, 537 (Fla. 2001). Ring overruled Walton, and the basic principle of Hildwin v. Florida, 490 U.S. 638 (1989) (per curiam), which had upheld the basic scheme in Florida "on grounds that 'the Sixth Amendment does not require that the specific findings authorizing imposition of the sentence of death be made by the jury.'" Ring at 2437 (quoting Walton, 497 U.S. at 648). Additionally, Ring undermines the reasoning of this Court's decision in Mills by establishing (a) that Apprendi applies to capital sentencing schemes, Ring at 2432 ("Capital defendants, no less than non-capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment"); id. at 23, (b) that States may not avoid the Sixth Amendment requirements of Apprendi by simply "specif[ying] 'death or life imprisonment' as the only sentencing options," Ring at 2440, and clarifying (c) that the relevant and dispositive question is whether under

state law death is "authorized by a guilty verdict standing alone." Id.

Florida's capital sentencing statute, like the Arizona statute struck down in Ring, makes imposition of the death penalty contingent upon the factual findings of the judge – not the jury. Section 775.082 of the Florida Statutes provides that a person convicted of first-degree murder must be sentenced to life imprisonment "unless the proceedings held to determine sentence according to the procedure set forth in § 921.141 result in finding by the court that such person shall be punished by death." This Court has long held that sections 775.082 and 921.141 do not allow imposition of a death sentence upon a jury's verdict of guilt, but only upon the finding of sufficient aggravating circumstances. Dixon v. State, 283 So.2d 1, 7 (Fla. 1973).

The "explicitly cross-reference[d] . . . statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty," Ring at 2440, requires the judge – after the jury has been discharged and "[n]otwithstanding the recommendation of a majority of the jury" – to make three factual determinations. Fla. Stat. § 921.141(3). Section 921.141(3) provides that "if the court imposes a sentence of death, it shall set forth in writing its

findings upon which the sentence of death is based as to the facts." Id. First, the trial court must find the existence of at least one aggravating circumstance. Id. Second, the judge must find that "sufficient aggravating circumstances exist" to justify death. Id. Third, the judge must find in writing that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Id. "If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with § 775.082." Id.

Because Florida's death penalty statute makes imposition of death contingent upon findings of "sufficient aggravating circumstances" and "insufficient mitigating circumstances," and gives sole responsibility for making those findings to the judge, it violates the Sixth Amendment.

The role of the jury in Florida's capital sentencing scheme neither satisfies the Sixth Amendment, nor renders harmless the failure to satisfy *Apprendi* and *Ring*. Florida juries do not make findings of fact

Florida's death penalty statute differs from Arizona's in that it provides for the jury to hear evidence and "render an advisory sentence to the court." Fla. Stat. § 921.141(2). A Florida jury's role in the capital sentencing process is insignificant under Ring, however. Whether one looks to the

plain meaning of Florida's death penalty statute, or cases interpreting it, "under section 921.141, the jury's advisory recommendation is not supported by findings of fact," Combs v. State, 525 So.2d 853, 859 (Fla. 1988) (Shaw, J., concurring), which is the central requirement of Ring.

This Court has rejected the idea that a defendant convicted of first degree murder has the right "to have the existence and validity of aggravating circumstances determined as they were placed before his jury." Engle v. State, 438 So.2d 803, 813 (Fla. 1983). The statute specifically requires the judge to "set forth . . . findings upon which the sentence of death is based as to the facts," but asks the jury generally to "render an advisory sentence . . . based upon the following matters" referring to the sufficiency of the aggravating and mitigating circumstances. Fla. Stat. 921.141(2) & (3). Thus, "the sentencing order is 'a statutorily required personal evaluation by the trial judge of the aggravating and mitigating factors' that forms the basis of a sentence of life or death." Morton v. State, 789 So.2d 324, 333 (Fla. 2001) (quoting Patton v. State, 784 So.2d 380 (Fla. 2000)).

As the Supreme Court said in Walton, "[a] Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in

Arizona." Walton, 497 U.S. at 648. The Florida Supreme Court has repeatedly emphasized that a judge's findings must be made independently of the jury's recommendation. See Grossman v. State, 525 So.2d 833, 840 (Fla. 1988). Because the judge must find that "sufficient aggravating circumstances exist" "notwithstanding the recommendation of a majority of the jury," Fla. Stat. § 921.141(3), he may consider and rely upon evidence not submitted to the jury. The judge is also permitted to consider and rely upon aggravating circumstances that were not submitted to the jury. Davis, 703 So.2d at 1061.

Because the jury's role is merely advisory and contains no findings upon which to judge the proportionality of the sentence, this Court has recognized that its review of a death sentence is based and dependent upon the judge's written findings. Morton, 789 So.2d at 333.

Florida juries are not required to render a verdict on elements of capital murder

Although "[Florida's] enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,'" and therefore must be found by a jury like any other element of an offense, Ring at 2444 (quoting Apprendi, 530 U.S. at 494), Florida law does not require the jury to reach a verdict on any of the factual determinations required for death.

Section 921.141(2) does not call for a jury verdict, but rather an "advisory sentence." This Court has held that "'the jury's sentencing recommendation in a capital case is only advisory. The trial court is to conduct its own weighing of the aggravating and mitigating circumstances . . . .'" Combs, 525 So.2d at 858 (quoting Spaziano v. Florida, 468 U.S. 447, 451) (emphasis original in Combs). It is reversible error for a trial judge to consider himself bound to follow a jury's recommendation. Ross v. State, 386 So.2d 1191, 1198 (Fla. 1980). Florida law only requires the judge to consider "the recommendation of a majority of the jury." Fla. Stat. § 921.141(3). In contrast, "[n]o verdict may be rendered unless all of the trial jurors concur in it." Fla. R. Crim. Pro. 3.440. No authority of Florida law requires that all jurors concur in finding the requisite aggravating circumstances.

Further, it would be unconstitutional to rely on a jury's majority advisory sentence as the basis for the fact-findings required for a death sentence. In Harris v. United States, 122 S.Ct. 2406 (2002), the Supreme Court held that under Apprendi "those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis." Id. In Ring, the Court held that the aggravating factors enumerated under Arizona

law operated as "the functional equivalent of an element of a greater offense" and thus had to be found by a jury. Id. Pursuant to the reasoning set forth in Apprendi and Ring, aggravating factors are equivalent to elements of the capital crime itself and must be treated as such.

Findings of the elements of a capital crime by a mere simple majority is unconstitutional under the Sixth and Fourteenth Amendments. In the same way that the Constitution guarantees a baseline level of certainty before a jury can convict a defendant, it also constrains the number of jurors who can render a guilty verdict. See Apodaca v. Oregon, 406 U.S. 404 (1972) (the Sixth and Fourteenth Amendments require that a criminal verdict must be supported by at least a "substantial majority" of the jurors). Clearly, a mere numerical majority -- which is all that is required under Section 921.141(3) for the jury's advisory sentence -- would not satisfy the "substantial majority" requirement of Apodaca. See, e.g., Johnson v. Louisiana, 406 U.S. 356, 366 (1972) (Blackmun, J., concurring) (a state statute authorizing a 7-5 verdict would violate Due Process Clause of Fourteenth Amendment).

The state was not required to convince the jury that death was a proper sentence beyond a reasonable doubt

The jury in Mr. Jones' case was not required to make the requisite findings beyond a reasonable doubt as required by the Sixth Amendment. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." Ring at 2439. Florida law makes a death sentence contingent not upon the existence of any individual aggravating circumstance, but on a judicial finding "[t]hat sufficient aggravating circumstances exist." Fla. Stat. § 921.141(3). Although Mr. Jones' jury was told that individual jurors could consider only those aggravating circumstances that had been proven beyond a reasonable doubt, it was not required to find beyond a reasonable doubt "whether sufficient aggravating circumstances exist to justify the imposition of the death penalty."

In summary, in light of the plain language of Florida's statute, the Rules of Criminal Procedure, and this Court's death penalty jurisprudence, it is clear that the limited role of the jury in Florida's capital sentencing scheme fails to satisfy the requirements of the Sixth Amendment. Even if the Florida Supreme Court were to redefine the jury's role under Florida law, it would not make Mr. Jones' death sentence valid. Mr. Jones' jury was repeatedly instructed that their recommendation

was merely advisory. As the Supreme Court held in Caldwell v. Mississippi, 472 U.S. 320 (1985):

> [I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.

Caldwell, 472 U.S. at 328-329.Were this Court to conclude now that Mr. Jones' death sentence rests on findings made by the jury after they were told, and Florida law clearly provided, that a death sentence would not rest upon their recommendation, it would establish that Mr. Jones' death sentence was imposed in violation of Caldwell.

Caldwell embodies the principle stated in Justice Breyer's concurring opinion in Ring: "the Eighth Amendment requires individual jurors to make, and to take responsibility for, a decision to sentence a person to death." Ring,(Breyer, J., concurring).

Mr. Jones' death sentence is invalid because the elements of the offense necessary to establish capital murder were not charged in the indictment.

Jones v. United States, 526 U.S. 227 (1999), held that "under the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty

for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Jones, at 243, n. 6. Apprendi held that the Fourteenth Amendment affords citizens the same protections when they are prosecuted under state law. Apprendi at 475-476. Ring held that a death penalty statute's "aggravating factors operate as 'the functional equivalent of an element or a greater offense.'" Ring at 2444 (quoting Apprendi, 530 U.S. at 494, n. 19).

In Jones, the Supreme Court noted that "[m]uch turns on the determination that a fact is an element of an offense, rather than a sentencing consideration," in significant part because "elements must be charged in the indictment." Jones, 526 U.S. at 232. On June 28, 2002, after the Court's decision in Ring, the death sentence imposed in United States v. Allen, 247 F.3d 741 (8th Cir. 2001), was overturned when the Supreme Court granted the writ of certiorari, vacated the judgement of the United States Court of Appeals for the Eighth Circuit upholding the death sentence, and remanded the case for reconsideration in light of Ring's holding that aggravating factors that are prerequisites of a death sentence must be treated as elements of the offense. Allen v. United States, 122 S.Ct. 2653 (2002).

The question presented in Allen was this:

> Whether aggravating factors required for a sentence of death under the Federal Death Penalty

> Act of 1994, 18 U.S.C. § 3591 et seq., are elements of a capital crime and thus must be alleged in the indictment in order to comply with the Due Process and Grand Jury clauses of the Fifth Amendment?

The Eighth Circuit rejected Allen's argument because in its view aggravating factors are not elements of federal capital murder but rather "sentencing protections that shield a defendant from automatically receiving the statutorily authorized death sentence." United States v. Allen, 247 F.3d at 763.

Like the Fifth Amendment to the United States Constitution, Article I, section 15 of the Florida Constitution provides that "No person shall be tried for a capital crime without presentment or indictment by a grand jury." Like 18 U.S.C. sections 3591 and 3592(c), Florida's death penalty statute makes imposition of the death penalty contingent upon the government proving the existence of aggravating circumstances, establishing "sufficient aggravating circumstances" to call for a death sentence, and that the mitigating circumstances are insufficient to outweigh the aggravating circumstance. Fla. Stat. §921.141(3).

Florida law clearly requires every "element of the offense" to be alleged in the information or indictment. In State v. Dye, 346 So. 2d 538, 541 (Fla. 1977), this Court held that "[a]n information must allege each of the essential elements of

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

The most "celebrated purpose" of the grand jury "is to stand between the government and the citizen" and protect individuals from the abuse of arbitrary prosecution. United States v. Dionisio, 410 U.S. 19, 33 (1973); see also Wood v. Georgia, 370 U.S. 375, 390 (1962). The Supreme Court explained that function of the grand jury in Dionisio:

> Properly functioning, the grand jury is to be the servant of neither the Government nor the courts, but of the people . . . As such, we assume that it comes to its task without bias or self-interest. Unlike the prosecutor or policeman, it has no election to win or executive appointment to keep.

Id., 410 U.S. at 35. The shielding function of the grand jury is uniquely important in capital cases. See Campbell v. Louisiana, 523 U.S. 392, 399 (1998)(recognizing that the grand jury "acts as a vital check against the wrongful exercise of power by the State and its prosecutors" with respect to "significant decisions such as how many counts to charge and . . . the important decision to charge a capital crime").

It is impossible to know whether the grand jury in this case would have returned an indictment alleging the presence of aggravating factors, sufficient aggravating circumstances, and insufficient mitigating circumstances, and thus charging Mr. Jones with a crime punishable by death. Nor can one have confidence that the grand jury intended to subject Mr. Jones and his petit jurors to the crucible of the capital sentencing process. The state's authority to decide whether to seek the execution of an individual charged with a crime hardly overrides - in fact is an archetypical reason for - the constitutional requirement of neutral review of prosecutorial intentions.

The Sixth Amendment requires that "[i]n all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation . . . ." A conviction on a charge not made by the indictment is a denial of due process of law.

State v. Gray, supra, citing Thornhill v. Alabama, 310 U.S. 88 (1940), and De Jonge v. Oregon, 299 U.S. 353 (1937).

Because the state did not submit to the grand jury, and the indictment did not state, the essential elements of the aggravated crime of capital murder, Mr. Jones' rights under Article I, section 15 of the Florida Constitution, and the Sixth Amendment to the federal Constitution were violated. By wholly omitting any reference to the aggravating circumstances that would be relied upon by the state in seeking a death sentence, the indictment prejudicially hindered Mr. Jones "in the preparation of a defense" to a sentence of death. Fla. R. Crim Pro.3.140(o).

Mr. Jones' death sentence was imposed in violation of the due process clause of the Fifth Amendment and the jury trial right guaranteed by the Sixth Amendment because he was required to prove the non-existence of an element necessary to make him eligible for the death penalty.

Under Florida law, a death sentence may not be imposed unless the judge finds the fact that "sufficient aggravating circumstances" exist to justify imposition of the death penalty. Fla. Stat. §921.141(3). Because imposition of a death sentence is contingent upon this fact being found, and the maximum sentence that could be imposed in the absence of that finding is life imprisonment, the Sixth Amendment requires that the state bear the burden of proving it beyond a reasonable doubt. Ring

at 2432 ("Capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."). Nevertheless, Florida juries, like Mr. Jones', are routinely instructed that it is their duty to render an opinion on life or death by deciding "whether sufficient mitigating circumstances exist[ed] to outweigh any aggravating circumstances found to exist."

The due process clause of the Fourteenth Amendment requires the state to prove beyond a reasonable doubt every fact necessary to constitute a crime. In Re Winship, 397 U.S. 358 (1970). The existence of "sufficient aggravating circumstances" that outweigh the mitigating circumstances is an essential element of death-penalty-eligible first-degree murder because it is the sole element that distinguishes it from the crime of first-degree murder, for which life is the only possible punishment. Fla. Stat. §§775.082, 921.141. For that reason, Winship requires the prosecution to prove the existence of that element beyond a reasonable doubt. The instruction given Mr. Jones' jury violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution and the Sixth Amendment's jury trial right because it relieves the state of its burden to prove beyond a reasonable doubt the element that "sufficient aggravating circumstances" exist which outweigh

mitigating circumstances by shifting the burden of proof to the defendant to prove that the mitigating circumstances outweigh sufficient aggravating circumstances. Mullaney v. Wilbur, 421 U.S. 684, 698 (1975).

In Mullaney, the United States Supreme Court held that a Maine statutory scheme delineating the crimes of murder and manslaughter violated the Due Process Clause of the Fourteenth Amendment. The Maine law at issue required a defendant to establish, by a preponderance of the evidence, that he acted in the heat of passion on sudden provocation, in order to reduce a charge of murder to manslaughter. Id at 691-692. Like the Florida statute at issue here, "the potential difference in [punishment] attendant to each conviction . . . may be of greater importance than the difference between guilt or innocence for many lesser crimes." Id at 698. The Supreme Court held that the statutory scheme unconstitutionally relieved the state of its burden to prove the element of intent. Id at 701-702. The Florida instruction produces the same fatal flaw.

To comply with the Eighth Amendment's requirement that the death penalty be applied only to the worst offenders, Florida adopted statute 921.141 as a means of distinguishing between death-penalty eligible and non-death-penalty eligible murder. State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973). Florida chose to

distinguish those for whom "sufficient aggravating circumstances" outweigh mitigating circumstances from those for whom "sufficient aggravating circumstances" do not outweigh the mitigating circumstances. Id. at 8. Because the former are more culpable, they are subjected to the most severe punishment. "By drawing this distinction, while refusing to require the prosecution to establish beyond a reasonable doubt the fact upon which it turns, [Florida] denigrates the interests found critical in Winship." Mullaney, 421 U.S. at 698.

Because Mr. Jones' jury was never required to find the element of sufficient aggravating circumstances beyond a reasonable doubt, the error here cannot be subjected to harmless error analysis. Sullivan v. Louisiana, 508 U.S. 275, 279-280 (1993). Consequently, this Court must vacate Mr. Jones' death sentence.

GROUND II

MR. JONES' SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS WERE INCORRECT UNDER FLORIDA LAW AND SHIFTED THE BURDEN TO MR. JONES TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE TRIAL COURT EMPLOYED A PRESUMPTION OF DEATH IN SENTENCING MR. JONES.

Under Florida law, a capital sentencing jury must be:

> [T]old that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed . . .
>
> [S]uch a sentence could be given if the state showed the aggravating circumstances outweighed the mitigating circumstances.

State v. Dixon, 283 So. 2d 1 (Fla. 1973) (emphasis added). See also Mullaney v. Wilbur, 421 U.S. 684 (1975). This straightforward standard was never applied at the penalty phase of Mr. Jones' capital proceedings.

Throughout his sentencing, Mr. Jones' jury was informed that if the mitigating circumstances outweighed the aggravating circumstances, then they should recommend life. This is an incorrect statement of the law. As stated above, the aggravating circumstances must outweigh the mitigating circumstances. Instead, death was the starting point and the burden was shifted to Mr. Jones to show that life was appropriate.

The court shifted to Mr. Jones the burden of proving whether he should live or die during the final jury charge by instructing the jurors that it was their duty to render an opinion on life or death by deciding "whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist." (TT. 997) These instructions given to Mr. Jones' jury were inaccurate and dispensed misleading information regarding who bore the burden of proof as to whether a death or a life recommendation should be returned. Defense counsel rendered prejudicially deficient assistance where he failed to object to the errors. See Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990).

In Hamblen v. Dugger, 546 So. 2d 1039 (Fla. 1989), a capital post-conviction action, this Court addressed the question of whether the standard employed shifted to the

defendant the burden on the question of whether he should live or die. The Hamblen opinion reflects that these claims should be addressed on a case-by-case basis in capital post-conviction actions. Defense counsel rendered prejudicially deficient assistance where he failed to object to the errors. See Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990).

Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), and Dixon, for such instructions unconstitutionally shift to the defendant the burden with regard to the ultimate question of whether he should live or die. In so instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing determination, thus violating Caldwell v. Mississippi, 472 U.S. 320 (1985), Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), and Maynard v. Cartwright, 108 S. Ct. 1853 (1988).

Judicial instructions at Mr. Jones' sentencing required that the jury impose death unless mitigation was not only produced by Mr. Jones, but also unless Mr. Jones proved that the mitigation he provided outweighed and overcame the aggravation. The trial court then employed the same standard in sentencing Mr. Jones to death. See Zeigler v. Dugger, 524 So. 2d 419 (Fla.

1988) (trial court is presumed to apply the law in accord with manner in which jury was instructed). This standard obviously shifted the burden to Mr. Jones to establish that life was the appropriate sentence and limited consideration of mitigating evidence to only those factors proven sufficient to outweigh the aggravation. The standard given to the jury violated state law. According to this standard, the jury could not "full[y] consider[]" and "give effect to" mitigating evidence. Penry, 109 S. Ct. 2934, 2951 (1989). This burden-shifting standard thus "interfered with the consideration of mitigating evidence." Boyde v. California, 110 S. Ct. 1190, 1196 (1990). Since "[s]tates cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the [death] penalty," McCleskey v. Kemp, 481 U.S. 279, 306 (1987), the instructions provided to Mr. Jones' sentencing jury, as well as the standard employed by the trial court, violated the Eighth Amendment's "requirement of individualized sentencing in capital cases [which] is satisfied by allowing the jury to consider all relevant mitigating evidence." Blystone v. Pennsylvania, 110 S. Ct. 1078, 1083 (1990). See also Lockett v. Ohio, 438 U.S. 586 (1978); Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821 (1987). The instructions gave the jury inaccurate and misleading information regarding who bore the

burden of proof as to whether a death recommendation should be returned. There can be no doubt that the jury understood that Mr. Jones had the burden of proving whether he should live or die, especially given the fact that the jury was never properly instructed.

The instructions violated Florida law and the Eighth and Fourteenth Amendments in two ways. First, the instructions shifted the burden of proof to Mr. Jones on the central sentencing issue of whether he should live or die. Under Mullaney, this unconstitutional burden-shifting violated Mr. Jones' due process and Eighth Amendment rights. See also Sandstrom v. Montana, 442 U.S. 510 (1979); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988). The jury was not instructed in conformity with the standard set forth in Dixon. Since the jury in Florida is a sentencer it must be properly instructed. Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993).

Second, in being instructed that mitigating circumstances must outweigh aggravating circumstances before the jury could recommend life, the jury was effectively told that once aggravating circumstances were established, it need not consider mitigating circumstances unless those mitigating circumstances were "sufficient" to outweigh the aggravating circumstances. Cf. Mills v. Maryland, 108 S. Ct. 1860 (1988); Hitchcock v.

Dugger, 481 U.S. 393, 107 S. Ct. 1821 (1987). Thus, the jury was precluded from considering mitigating evidence, Hitchcock, and from evaluating the "totality of the circumstances" in considering the appropriate penalty. State v. Dixon, 283 So. 2d at 10. According to the instructions, jurors would reasonably have understood that only mitigating evidence which rose to the level of "outweighing" aggravation need be considered. Therefore, Mr. Jones is entitled to relief in the form of a new sentencing hearing in front of a jury, due to the fact that his sentencing was tainted by improper instructions.

GROUND III

MR. JONES' SENTENCING JURY WAS MISLED BY INSTRUCTIONS THAT UNCONSTITUTIONALLY AND INACCURATELY DILUTED THE JURY'S SENSE OF RESPONSIBILITY TOWARDS SENTENCING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Mr. Jones is entitled to relief because a capital sentencing jury must be properly instructed as to its role in the sentencing process. Espinosa v. Florida, 112 S. Ct. 2926 (1992); Hitchcock v. Dugger, 481 U.S. 393 (1987); Caldwell v. Mississippi, 472 U.S. 320 (1985); Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc), cert denied, 109 S.Ct. 1353 (1989). Therefore, even instructional error not accompanied by a contemporaneous objection warrants reversal. Meeks v. Dugger, 576 So. 2d 713 (Fla. 1991); Hall v. State, 541 So. 2d 1125 (Fla. 1989).

In Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988) (en banc), the petitioner was awarded relief when he presented a claim involving prosecutorial and judicial comments and instructions that diminished the jury's sense of responsibility. Mr. Jones is entitled to the same relief. A contrary outcome would result in a totally arbitrary imposition of the death penalty in violation of the Eighth Amendment. Furman v. Georgia, 408 U.S. 238 (1972).

Mann and Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988), have determined that Caldwell applies to Florida capital sentencing proceedings and when either judicial instructions or prosecutorial comments minimize the jury's sentencing role, relief is warranted. The purpose of Caldwell is that capital sentences be individualized and reliable. Caldwell, 472 U.S. at 340-41.

Throughout the proceedings in Mr. Jones' case, statements were made frequently implicating a difference between the jurors' responsibility at the guilt-innocence phase of the trial and their non-responsibility at the sentencing phase. The jury was told it merely recommended a sentence to the judge, their recommendation was only advisory, and that the judge alone had the responsibility to determine the sentence to be imposed for first-degree

murder. (TT. 996-1001) This is a weighty statement to the jury and they were given the wrong impression.

The Court failed to instruct the jury that its recommendation would only be overridden in circumstances where no reasonable person could agree with it. Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975).

Under Florida's capital statute, the jury has the primary responsibility for sentencing. Its decision is entitled to great weight. McCampbell v. State, 421 So. 2d 1072, 1075 (Fla. 1982); Espinosa v. Florida, 112 S. Ct. 2926 (1992). Thus, suggestions and instructions that a capital sentencing judge has the sole responsibility for the imposition of sentence, or is free to impose whatever sentence he or she deems appropriate irrespective of the sentencing jury's decision, is inaccurate and is a misstatement of Florida law. See Mann at 1450-55 (discussing critical role of jury in Florida capital sentencing scheme); Espinosa v. Florida, 112 S. Ct. 2926 (1992). The jury's sentencing verdict can be overturned by the judge only if the facts are "so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). Mr. Jones' jury, however, was led to believe that the judge was the "ultimate" sentencer.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Petitioner, Harry Jones, respectfully urges this Court to grant habeas corpus relief in the form of a new trial and/or penalty phase.

Respectfully submitted,

_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus, has been furnished by first class mail, postage prepaid to Stephen R. White, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, PL-01, The Capitol, Tallahassee, FL 32317, on this ___ day of _____, 2007.

CERTIFICATION OF TYPE SIZE AND STYLE

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