IN THE SUPREME COURT OF FLORIDA

CASE NO.SC02-2142

CURTIS WINDOM,

Petitioner,

v.

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

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This is Mr. Windom's 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. Windom was deprived of the right to a fair, reliable, and individualized sentencing proceeding and that the proceedings resulting in his convictions and death sentences violated fundamental constitutional imperatives.

Citations shall be as follows:

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

"PP-R. ___." The transcript of the penalty phase proceedings.

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

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

INTRODUCTION

Significant errors occurred at Mr. Windom's capital trial and sentencing. The capital sentencing scheme under which Mr. Windom was sentenced unconstitutionally denied Mr. Windom the right to trial by jury of the essential elements of the crime

of capital murder. The judge, without the aid or benefit of the jury, found the facts necessary to sentence Mr. Windom to death. Further, the indictment in Mr. Windom's case, in violation of Mr. Windom's constitutional rights, failed to specify the elements of the offense necessary for application of the death penalty. Also, issues were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel. For example, appellate counsel raised no issue regarding the prosecutor insinuating that defense counsel had personal knowledge about the case. This and other errors violated Mr. Windom's fundamental rights to a fair trial and individualized sentencing.

As this petition will demonstrate, Mr. Windom is entitled to habeas relief.

REQUEST FOR ORAL ARGUMENT

Due to the seriousness of the issues involved, Petitioner respectfully requests oral argument.

PROCEDURAL HISTORY

On March 3, 1992, an Orange County grand jury indicted Mr. Windom on three counts of first-degree murder and one count of attempted first-degree murder. (R. 153-55, 268-70) There was no indictment alleging any applicable aggravating circumstances under Florida Statute 921.141.

On August 28, 1992, a jury found Mr. Windom guilty on all counts as charged. (R. 301-04, 726)

On September 28, 1992, a jury recommended death for the three murder convictions. (PP-R. 108-09) On November 10, 1992, the trial court followed the jury's recommendation and imposed a death sentence for all three murder convictions. (R. 129-131, 305-08, 355-63)

On direct appeal, this Court affirmed Mr. Windom's convictions and sentences. Windom v. State, 656 So.2d 432 (Fla. 1995), cert. denied, 116 S.Ct. 571 (1995).

Mr. Windom filed his initial Rule 3.850 motion on March 19, 1997. On August 4, 2000, Mr. Windom filed an amended Rule 3.850 motion. The trial court held an evidentiary hearing in this matter June 4-7, 2001. The trial court thereafter denied relief in an order dated November 1, 2001. (PC-R. 2622-68) Mr. Windom now files this petition seeking habeas corpus relief.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). See Art. 1, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and 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 Mr.
Windom'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 Mr. Windom'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. Windom 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 on the basis of Mr. Windom's claims.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Windom asserts that his capital convictions and sentences 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.

CLAIM I

FLORIDA'S CAPITAL SENTENCING SCHEME IS UNCONSTITUTIONAL UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION RENDERING MR. WINDOM'S DEATH SENTENCES ILLEGAL AND HE IS ENTITLED TO LIFE SENTENCES. MR. WINDOM HAS BEEN DENIED HIS RIGHT TO TRIAL BY JURY OF THE ESSENTIAL ELEMENTS OF THE CRIME OF CAPITAL FIRST DEGREE MURDER. AT A MINIMUM, MR. WINDOM IS ENTITLED TO A JURY TRIAL AND JURY VERDICT ON THE ESSENTIAL ELEMENTS OF CAPITAL FIRST DEGREE MURDER.[1]

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[1] In order to ensure that Mr. Windom has properly pled this claim, he brings it in this petition for writ of habeas corpus. This Court has addressed similar claims in several petitions for writ of habeas corpus: Mills v. Moore, 786 So. 2d 532 (Fla. 2001); Mann v. Moore, 794 So. 2d 595 (Fla. 2001); Brown v. Moore, 800 So. 2d 223 (Fla. 2001).

However, Mr. Windom recognizes that claims of fundamental changes in the law are generally raised in motions for postconviction relief under Florida Rule of Criminal Procedure 3.850. See Adams v.State, 543 So. 2d 1244 (Fla. 1989); Dixon v. State, 730 So. 2d 265 (Fla. 1999). Because Mr. Windom is currently appealing the circuit court's denial of his motion

The statute under which Mr. Windom was sentenced to death is unconstitutional because it requires the judge–without the aid of the jury – to make other findings necessary for the imposition of a death sentence.[2] See Ring v. Arizona, 122 S. Ct. 2428 (June 24, 2002). Ring 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, 122 S. Ct. at 2443.[3]

This Court previously held that, "[b]ecause Apprendi did not overrule Walton, the basic scheme in Florida is not overruled either." See Mills v. Moore, 786 So. 2d 532, 537 (Fla. 2001). Ring overruled Walton, and the basic principle

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for postconviction relief, he does not have an opportunity to raise this claim in such a motion. If this claim must be brought in a motion for postconviction relief, Mr. Windom requests that this Court relinquish jurisdiction, so that he may file such a motion in circuit court.

[2] In support of each death sentence, the trial judge found the following two aggravating factors: 1) the defendant had been previously convicted of another capital offense or felony involving the use of threat or violence to the person, and 2) the crime was cold, calculated and premeditated. See Windom v. State, 656 So. 2d 432, 435 (Fla. 1995).

[3] Recently, in Bostick v. State, an enhanced sentence of life without parole was thrown out because the judge, without the jury, found the qualifying aggravating circumstance that each victim was under the age of twelve. See Bostick v. State, No. 33S00-9911-CR-651, 2002 WL 1897898, at *5 (Ind. 2002).

of Hildwin v. Florida, 490 U.S. 638 (1989) (per curium), which had upheld the capital sentencing scheme in Florida "on grounds that 'the Sixth Amendment does not require that the specific findings authorizing imposition of the sentence of death be made by the jury.'" Ring, 122 S. Ct. at 2437 (quoting Walton, 497 U.S. at 648 (quoting Hildwin, 490 U.S. at 640-641)). However, recently, this Court granted a stay of execution in Bottoson v. State, in which Justice Pariente stated in her concurring opinion:

> . . . in the United States Supreme Court's opinion in Ring, the Court clearly and unequivocally held that Apprendi did apply to capital cases, thus proving our opinion in Mills wrong. In other words, we were mistaken as a matter of law in our previous opinion in Bottoson in holding that Apprendi did not apply to capital proceedings.

Bottoson v. Moore, SC 02-1455 (July 8, 2002), Order Granting Stay of Execution and Setting Oral Argument at 7. (emphasis in original).

Additionally, Ring undermines the reasoning of this Court's decision in Mills by recognizing: a) that Apprendi applies to capital sentencing schemes, Ring, 122 S. Ct. 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"); 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, 122 S. Ct. at 2240; and 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 section 921.141 result in finding by the court that such person shall be punished by death, and in the latter event such person shall be punished by death."[4] 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. See Dixon v. State, 283 So. 2d 1, 7 (Fla. 1973).

The "explicitly cross-reference[d] . . .statutory

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[4] Cf. Ring, 122 S. Ct. at 2240-41 (describing and quoting Arizona death penalty statute).

provision requiring the finding of an aggravating circumstance before imposition of the death penalty," Ring, 122 S. Ct. at 2240, 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. See 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 judge must find the existence of at least one aggravating circumstance. See id. Second, the judge must find that "sufficient aggravating circumstances exist" to justify imposition of the death penalty.[5] Id. Third, the judge must find in writing that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." See id. "If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with Section 775.082." Id.

Because Florida's death penalty statute makes imposition of a death sentence contingent upon findings of "sufficient

[5] The jurors need only find sufficient aggravating circumstances to "recommend" an "advisory sentence" of death. See Fla. Stat. § 921.141 (2). They are not required to find this fact beyond a reasonable doubt.

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 for several reasons. First, 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." See Fla. Stat. § 921.141(2). A Florida jury's role in the capital sentencing process is insignificant under Apprendi and Ring, however.

First, whether one looks to the plain meaning of Florida's death penalty statute, or the cases interpreting it, "under section 921.141, the jury's advisory recommendation is not supported by findings of fact." See Combs v. State, 525 So. 2d 853, 859 (Fla. 1988) (Shaw, J., concurring). This 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." See Engle v. State, 438 So. 2d 803, 813 (Fla. 1983), explained in Davis v. State, 703 So. 2d 1055, 1061 (Fla. 1997). The

statute specifically requires the judge to "set forth . . . findings upon which the sentence of death is based as to the facts," but asks the jury generally to "render an advisory sentence . . . based upon the following matters" referring to the sufficiency of the aggravating and mitigating circumstances. See Fla. Stat. §§ 921.141(2), (3) (emphasis added). Because Florida law does not require that any number of jurors agree that the State has proven the existence of a given aggravating circumstance before it may be deemed "found," it is impossible to say that the "jury" found proof beyond a reasonable doubt of a particular aggravating circumstance. Thus, "the sentencing order is a 'statutorily required personal evaluation by the trial judge of the aggravating and mitigating factors' that forms the basis of a sentence of life or death." Morton v. State, 789 So. 2d 333 (Fla. 2001) (quoting Patton v. State, 784 So. 2d 380 (Fla. 2000)).

As the Supreme Court stated 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 the trial judge's findings must be made independently of the jury's recommendation. See

Grossman v. State, 525 So. 2d 833, 840 (Fla. 1988). 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. See Porter v. State, 400 So. 2d 5 (Fla. 1981); Davis v. State, 703 So. 2d 1055, 1061 (Fla. 1997). The judge is also permitted to consider and rely upon aggravating circumstances that were not submitted to the jury. See Davis, 703 So. 2d at 1061 (citing Hoffman v. State, 474 So. 2d 1178 (Fla. 1985)); Fitzpatrick v. State, 437 So. 2d 1972, 1078 (Fla. 1983); Engle, 438 So. 2d at 813. In fact, in Mr. Windom's case, the judge considered evidence in aggravation that the jury never heard[6]. The judge alone was also privy to testimony of mitigation witnesses[7].

Because the jury's role is merely advisory and contains no findings upon which to judge the proportionality of the sentences, this Court has recognized that its review of a death sentence is based upon, and dependent upon, the judge's

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[6] At the sentencing hearing, the state submitted statements relating to the defendant's drug trafficking and dealing in cocaine. (R531)

[7] Defense counsel presented six witnesses at the mitigation and sentencing hearing: Jerline Windom, Willie May Rich, Mary Jackson, Charlene Mobley, Julie Harp and John Henry Scarlet. None were presented at the penalty phase held in front of the jury.

written findings. See Morton, 789 So. 2d at 333 ("The sentencing order is the foundation for this Court's proportionality review, which may ultimately determine if a person lives or dies."); Grossman, 525 So. 2d at 839; Dixon, 283 So. 2d at 8.

Additionally, Florida juries are not required to render a verdict on elements of capital murder. Even though "[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, see Ring, 122 S. Ct. at 2243 (quoting Apprendi, 530 U.S. at 494), Florida law does not require the jury to reach a verdict on any of the factual determinations required before a death sentence could be imposed. Section 921.141(2) does not call for a jury verdict, but rather an "advisory sentence." The Florida Supreme Court has made it clear that "the jury's sentencing recommendation in a capital case is only advisory. The trial court is to conduct its own weighing of the aggravating and mitigating circumstances . . .." Combs, 525 So. 2d at 858 (quoting Spaziano v. Florida, 468 U.S. 447, 451 (1984)) (emphasis in original). "The trial judge . . . is not bound by the jury's recommendation, and is given final authority to determine the appropriate sentence."

Engle, 438 So. 2d at 813. It is reversible error for a trial judge to consider himself bound to follow a jury's recommendation and thus "not make an independent [determination] whether the death sentence should be imposed." 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." See 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. P. 3.440. Neither the sentencing statute, this Court's cases, nor the jury instructions in Mr. Windom's case required that all jurors concur in finding any particular aggravating circumstance, or "whether sufficient aggravating circumstances exist," or "whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances." Fla. Stat. § 921.141 (2).

Because Florida law does not require any number of, much less twelve, jurors to agree that the government has proved an aggravating circumstance beyond a reasonable doubt, or to agree on the same aggravating circumstances when advising that "sufficient aggravating circumstances exist" to recommend a death sentence, there is no way to say that "the jury" rendered a verdict as to an aggravating circumstance or the

sufficiency of them. As Justice Shaw observed in Combs, Florida law leaves these matters to speculation. See Combs, 525 So. 2d at 859 (Shaw., J., concurring).

Further, it would be impermissible and unconstitutional to rely on the jury's advisory sentence as the basis for the fact-findings required for a death sentence, because the statute requires only a majority vote of the jury in support of that advisory sentence. In Harris v. United States, 122 S. Ct. 2406 (June 24, 2002), rendered on the same day as Ring, the United States Supreme Court held that under the Apprendi test "those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis." Harris, 122 S. Ct. at 2419. And in Ring, the Court held that the aggravating factors enumerated under Arizona law operated as "the functional equivalent of an element of a greater offense" and thus had to be found by a jury. See Ring, 122 S. Ct. at 2243. In other words, pursuant to the reasoning set forth in Apprendi, Jones, and Ring, aggravating factors are equivalent to elements of the capital crime itself and must be treated as such.

One of the elements that had to be established for Mr. Windom to be sentenced to death was that "sufficient

aggravating circumstances exist" to call for a death sentence. See Fla. Stat. § 921.141 (3).[8] The jury was not instructed that it had to find this element proved beyond a reasonable doubt. In fact, it was not instructed on any standard by which to make this essential determination. Such an error can never be harmless. See Sullivan v. Louisiana, 508 U.S. 275, 278 (1993) ("[T]he jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt). Where the jury has not been instructed on the reasonable doubt standard:

> there has been no jury verdict within the meaning of the Sixth Amendment, [and] the entire premise of Chapman[9] review is simply absent. There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no object, so to speak, upon which harmless-error scrutiny can operate.

Sullivan, 508 U.S. at 280. Viewed differently, in a case such as this where the error is not requiring a jury verdict on the

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

[9] Chapman v. California, 386 U.S. 18 (1967).

essential elements of capital murder, but delegating that responsibility to a court, “no matter how inescapable the findings to support the verdict might be, for a court to hypothesize a guilty verdict that was never rendered . . . would violate the jury-trial right." Id., 508 U.S. at 279. The review would perpetuate the error, not cure it.

Permitting any such findings of the elements of a capital crime by a mere simple majority is unconstitutional under the Sixth and Fourteenth Amendment. 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 Amendment require that a criminal verdict must be supported by at least a "substantial majority" of the jurors). The standards for imposition of a death sentence may be even more exacting than the Apodaca standard (which was not a death case) – but they cannot be constitutionally less. 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) (explaining that a state statute

authorizing a 7-5 verdict would violate Due Process Clause of the Fourteenth Amendment).

Ultimately, the State was not required to convince the jury that death was a proper sentence 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, 122 S. Ct. at 2439. Florida law makes a death sentence contingent not upon the existence of any individual aggravating circumstances, but on a judicial finding "[t]hat sufficient aggravating circumstances exist." See Fla. Stat. § 921.141(3) (emphasis added). Although Mr. Windom's jury was told that individual jurors could consider only those aggravating circumstances that had been proved 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 light of the plain language of Florida's death penalty 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 jury's role were redefined under Florida law, it would not make Mr. Windom's death sentence valid. Mr. Windom's jury was told repeatedly during the penalty phase that the final decision as to sentencing rested with the judge. (PP-R. 22, 101) As the United States Supreme court held :

> [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 v. Mississippi, 472 U.S. 320, 328-329 (1985). Were this Court to conclude now that Mr. Windom's death sentences rest on findings made by the jury after they were told, and Florida law clearly provided, that the death sentence would not rest upon their recommendation, it would establish that Mr. Windom's death sentences were imposed in violation of Caldwell. Caldwell embodies the principle stated in Justice Breyer's concurring opinion in Ring: "[T]he Eighth Amendment requires individual jurors to make, and to take responsibility for, a decision to sentence a person to death." See Ring, 122 S. Ct. at 2448 (Breyer, J., concurring).

Mr. Windom's death sentences were also imposed in an unconstitutional manner 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. See 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 required that the State bear the burden of proving it beyond a reasonable doubt. See Ring, 122 S. Ct. at 2432 ("Capital defendants . . . are entitled to a jury determination of any fact the legislature conditions an increase in their maximum punishment."). Nevertheless, Florida juries, like Mr. Windom's, are routinely instructed that it is 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." (PP-R. 101)

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. See Fla. Stat. §§ 775.082, 921.141. For that reason, Winship requires the prosecution to prove the existence of that element beyond a reasonable doubt. Mr. Windom's jury was told by the judge that the mitigating circumstances had to outweigh the aggravating ones. (PP-R. 101) The State exacerbated this error by telling the jury that they need only decide if the mitigation produced was sufficient to outweigh the aggravating factors. (PP-R. 88) This violated Mr. Windom's constitutional rights to due process and trial by jury, under the Fourteenth and Sixth Amendments to the U.S. Constitution, because they relieved 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. See Mullaney v. Wilbur, 421 U.S. 684, 698 (1975).

To comply with the Eighth Amendment's requirement that the death penalty be applied only to the worst offenders, Florida adopted § 921.141 as a means of distinguishing between death-penalty eligible and non-death-penalty eligible murder.

See 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. See id., at 8. Because the former are more culpable, they are subjected to the most severe punishment: death. "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.

Compounding the Ring error is the fact that one of the aggravators the jury was instructed on was later stricken by this Court. At Mr. Windom's trial, the jury recommended death sentences for the murder of Johnnie Lee, Valerie Davis and Mary Lubin. In her sentencing order, the trial judge found that the aggravators of previous conviction of a violent felony and cold, calculated and premeditated (CCP) applied. On direct appeal, this Court rejected CCP for the murders of Valerie Davis and Mary Lubin, but affirmed the aggravator for Johnnie Lee. See Windom v. State, 656 So. 2d 432, 439 (Fla. 1995). Although the jury was instructed on two aggravators, they might very well have voted for a death sentence for

Valerie Davis and Mary Lubin based solely on CCP. This would not qualify as a 'sufficient aggravating factor' because it was later rejected by this Court. This error is compounded by the fact that the jury received inadequate guidance concerning the CCP aggravator. The Court gave the following instruction to Mr. Windom's jury:

> "The crime for which the Defendant is to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification."

(PP-R. 102)

No narrowing instruction was given. This Court has held that this instruction is unconstitutionally vague and likely to cause jurors to automatically characterize first-degree murder as involving the CCP aggravator. Jackson v. State, 648 So. 2d 85 (Fla. 1994). It is likely the jury found CCP existed for the crimes against Valerie Davis and Mary Lubin because of this inadequate instruction. This instruction also taints the jury finding of CCP for the murder of Johnny Lee.

The jury was further tainted by victim impact evidence. During the penalty phase, the State witness Vickie Ward testified as to the effect the murders had on the children of Winter Garden. At one point, she recited an essay a child had written about the murders:

> "Some terrible things happened in my family this year because of drugs. If it hadn't been for Dare, I would have killed myself."

(PP-R. 31)

Although the jury is not supposed to consider victim impact evidence as an aggravator, this testimony was highly charged and emotional. It could have easily influenced the jury to recommend death sentences. In the absence of jury findings, this remains a strong possibility.

Consequently Mr. Windom is entitled to relief. This Court should vacate Mr. Windom's death sentences and impose life sentences. In the alternative, this Court should vacate the death sentences and order a trial by jury regarding the aggravating and mitigating circumstances in accordance with the mandate of Ring.

CLAIM II

MR. WINDOM'S DEATH SENTENCES ARE INVALID AND MUST BE VACATED BECAUSE THE ELEMENTS OF THE OFFENSE NECESSARY TO ESTABLISH CAPITAL MURDER WERE NOT CHARGED IN THE INDICTMENT IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, THE FLORIDA CONSTITUTION, AND DUE PROCESS.

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 v. New Jersey, 530 U.S. 466 (2000), held that the Fourteenth Amendment affords citizens the same protections when they are prosecuted under state law. Apprendi, 530 U.S. at 475-476. [10] Ring v. Arizona, 122 S. Ct. 2428 (June 24, 2002), held that a death penalty statute's "aggravating factors operate as 'the functional equivalent of an element of a greater offense.'" Id. at 2243 (quoting Apprendi, 530 U.S. at 494, n.19).

In Jones, the United States Supreme Court noted that "much 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." See 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 of the Eighth Circuit upholding the death sentence, and remanded the case for reconsideration in light of Ring's

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

holding that aggravating factors that are prerequisites of a death sentence must be treated as elements of the offense. See Allen v. United States, 122 S. Ct. 2653 (June 28, 2002). The question presented in Allen was:

> Whether aggravating factors required for a sentence of death under the Federal Death Penalty Act of 1994, 18 U.S.C. sec 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.

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 §§ 3591, 3592), Florida's death penalty statute, Fla. Stat. §§ 775.082 and 921.141, 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 circumstances. See 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 said

"[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 Florida Supreme Court stated "[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." See id. 435 So. 2d at 818. Finally, in Chicone v. State, 684 So. 2d 736 (Fla. 1996), this Court stated "[a]s a general rule, an information must allege each of the essential elements of a crime to be valid." See id. at 744.

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. Windom with a crime punishable by death. The State's authority to decide whether to seek the execution of an individual charged with a crime hardly overrides the constitutional requirement of neutral review of prosecutorial intentions; the State's authority to seek death is in fact an archetypical reason for this constitutional requirement. See

e.g., United States v. Dionisie, 410 U.S. 19, 33 (1973); Wood v. Georgia, 370 U.S. 375, 390 (1962); Campbell v. Louisiana, 523 U.S. 393, 399 (1998).

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. See Gray, 435 So. 2d at 818 (citing Thornhill v. Alabama, 310 U.S 88 (1940) and DeJonge v. Oregon, 299 U.S. 353 (1937)). 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. Windom "in the preparation of a defense" to a sentence of death. See Fla. R. Crim. P. 3.140(o).

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. Windom's rights under Article I, Section 15 of the Florida Constitution, and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution were violated. Mr. Windom's death sentences should be vacated.

CLAIM III

MR. WINDOM WAS DENIED THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHERE COUNSEL FAILED TO

ASSERT FUNDAMENTAL ERROR WHERE THE JURY WAS ALLOWED TO HEAR ARGUMENT AT THE GUILT/INNOCENCE AND PENALTY PHASES THAT PRESENTED IMPERMISSIBLE CONSIDERATIONS, MISSTATED THE LAW AND FACTS, AND WERE INFLAMMATORY AND IMPROPER. THIS ERROR RENDERED MR. WINDOM'S TRIAL AND SENTENCING FUNDAMENTALLY UNFAIR AND UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

At several points during the guilt phase and penalty phases, the prosecutor misquoted testimony, misstated the facts of the case, and made erroneous statements of law. Trial counsel failed to object to many of these remarks.

Insinuation of Personal Knowledge

During the redirect examination of Jack Luckett, the following exchange took place:

> "BY MR. ASHTON:
>
> Q. Have you ever known Mr. Windom to be violent to anybody?
>
> A. No, sir.
>
> Q. You have never heard about an instance of violence?
>
> MR. LEINSTER: An instance is not reputation.
>
> THE COURT: It has to be more than one instance.
>
> MR. ASHTON: Your Honor, he asked if he had ever been violent. Ever is ever. I want to - - ever is a broad question. Has he ever been violent. It's in direct

response to that question.

THE COURT: You did ask if he had ever been violent.

MR. LEINSTER: Say is this out of character. Is he known to be - - this kind of question.

MR. ASHTON: Mr. Leinster knows this is an argument with his girlfriend.

MR. LEINSTER: I don't know any such thing. I move for a mistrial."

(R. 330-31)

Mr. Leinster thereafter expressed his concern over the above statements:

"MR. LEINSTER: . . . My overriding concern now is that Mr. Ashton has published to the jury that fact that I somehow know that my client is violent. That isn't the truth at all."

(R. 331)

A prosecutor may not suggest personal knowledge of evidence not admitted at trial. United States v. McAllister, 77 F.3d 387 (11th Cir. 1996). It logically follows that a prosecutor cannot imply that the defense lawyer has personal knowledge of evidence. The prosecutor at Mr. Windom's trial violated this tenet, by insinuating that defense counsel knew that his client was violent. This was patently wrong, and flies in the face of the prosecutor's strictest duty:

"[The prosecutor's] duty is not to obtain

> convictions but to seek justice, and he must exercise that responsibility with the circumspection and dignity the occasion calls for. His case must rest on evidence, not innuendo. If his case is not a sound one, his evidence is enough. [If] it is not sound, he should not resort to innuendo to give it a false appearance of strength."

Kirk v. State, 227 So. 2d 40, 43 (4th DCA 1969).

The prosecutor's actions are especially harmful in a case like Mr. Windom's. The crux of Mr. Windom's defense is that he committed a rash and impulsive act. If the jury is told that Mr. Windom has a history of violence, they are less likely to believe that his actions were impulsive, and more likely to think they were premeditated.

This claim has been preserved for state habeas purposes. Defense counsel raised a proper objection at trial by moving for a mistrial. (R. 331) This claim was also not raised on direct appeal. Appellate counsel was ineffective for not raising this claim.

Guilt Phase Closing Argument

The most egregious example of improper argument occurred during the prosecutor's discussion of Dr. Kirkland's testimony. The prosecutor told the jury:

> Dr. Kirkland affirmatively and completely states that Curtis Windom was not under any mental disease or defect that day. That, as far as he knows, everything that Curtis Windom did, he had the perfect ability to

plan, premeditate and intend.

(R. 663)

The prosecutor's statement was a blatant misrepresentation of Dr. Kirkland's testimony. At no point during his testimony did Dr. Kirkland testify that Mr. Windom was "not under any mental disease or defect." (R. 580-94) Nor did Dr. Kirkland ever offer the opinion that Mr. Windom "had the perfect ability to plan, premeditate and intend."[11] (R. 580-94)

In reality, Dr. Kirkland's testimony was limited to the question of whether or not Mr. Windom was in a "fugue state" at the time of the shootings – nothing more. Dr. Kirkland did not and in fact could not have offered an opinion concerning whether Mr. Windom was under any mental disease or defect. He could not have offered such an opinion because, as he indicated in his report, "I do not have sufficient information to form an opinion about his sanity at the time of the offenses." (R. 209)

The prosecutor's statement that Dr. Kirkland "affirmatively and completely" testified that Mr. Windom was "not under any mental disease or defect" was totally untrue.

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[11] Dr. Kirkland never evaluated Mr. Windom to determine his mental state at the time of the offenses for purposes of insanity defense or for developing mitigation.

The jury was led to believe that Dr. Kirkland considered Mr. Windom perfectly sane at the time of the offenses, which was clearly not the case. Any competent attorney would have objected to the prosecutor's blatant mischaracterization of the testimony; Mr. Windom's counsel did not.

The prosecutor misstated other portions of the guilt phase testimony as well. He argued to the jury that Valerie Davis was yelling at Mr. Windom just before she was shot (R. 659), but the record is devoid of any testimony to that effect. He argued that Mr. Windom waited for Mary Lubin to drive by so that he could shoot her, (R. 655), but no evidence of this appears anywhere in the record.

Penalty Phase Closing Argument

The State's penalty phase closing argument included the following remarks:

> "Have you heard anything about the Defendant's record? No. You have not heard anything about the Defendant's record; not a word. So you have no information to find mitigation there. Well, let me address one thing.
>
> You did hear from some witnesses in the guilt phase, something to the effect that they personally had never seen Curtis being violent. Now, they did not say that he had never been violent. They simply said we have never seen him be violent. So obviously you can consider that, the Defendant's character."

(PP-R. 87-88).

The prosecutor's comments were improper for three reasons: First, by suggesting that Mr. Windom's failure to come forward with information about his record was evidence that Mr. Windom had something to hide, the prosecutor's argument was an improper comment on Mr. Windom's right to remain silent. Second, the prosecutor insinuated that he was privy to information about Mr. Windom's history of violence of which the jury was unaware. Third, the prosecutor's argument shifted the burden to Mr. Windom to prove that death was not the appropriate punishment. See, Maynard v. Cartwright, 108 S. Ct. 1853 (1988). It is the duty of a prosecutor to refrain from making damaging remarks that could affect the fairness and impartiality to which a defendant is entitled. Peterson v. State, 376 So. 2d 1230, 1235 (4th DCA 1979).

Conclusion

The prosecutor's errors can be considered cumulatively. See Kyles v. Whitley, 514 U.S. 419 (1995); Lightbourne v. State, 742 So. 2d 238 (Fla. 1999); Cook v. State, 792 So. 2d 1197(Fla. 2001); see also Peterson v. State, 376 So. 2d 1230, 1234 (4th DCA 1979)("contents of the [prosecutorial] final argument, taken as a whole, were such as utterly to destroy the defendant's most important right under our

system.") Taken in their entirety, these errors are fundamental because they reach into the very heart of the case. Peterson, 376 So. 2d at 1234; see also Travers v. State, 578 So. 2d 793, 797 (1st DCA 1991). In Peterson v. State, the prosecutor made a number of improper remarks throughout the trial. The court held that his errors when considered cumulatively were fundamental, and mandated a new trial. Peterson, 376 So. 2d at 1234. Appellate counsel was ineffective for failing to raise this claim on direct appeal, because the combination of these errors "reaches down into the validity of the trial itself" to the extent that the death sentence would not have been obtained without the assistance of errors. See Kilgore v. State, 688 So. 2d 895, 898 (Fla. 1996). Mr. Windom's trial attorney's failure to properly object at trial does not preclude raising this claim on direct appeal. See Urbin v. State, 714 So. 2d 411 (Fla. 1988). In the interests of justice, this Court must grant habeas relief.

CONCLUSION AND RELIEF SOUGHT

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

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 Scott Browne, Assistant Attorney General, Office of the Attorney General, Westwood Building, 7th Floor, 2002 North Lois Avenue, Tampa FL 33607, on this ___ day of October, 2002.

CERTIFICATION OF TYPE SIZE AND STYLE

This is to certify that the Petition for Writ of Habeas Corpus has been reproduced in a 12-point Courier type, a font that is not proportionately spaced.

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