IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-1797

DENNIS SOCHOR,

Petitioner,

v.

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

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

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

Citations to the Record on the Direct Appeal shall be as (R. ___). All other citations shall be self-explanatory.

JURISDICTION

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

REQUEST FOR ORAL ARGUMENT

Mr. Sochor requests oral argument on this petition.

PROCEDURAL HISTORY

The Circuit Court of the Seventeenth Judicial Circuit, Broward County, entered the judgments of conviction and sentence under consideration.

Mr. Sochor was indicted on October 9, 1986 for the crimes of murder in the first degree in count I and kidnapping in count II of the indictment (R. 1143).

Mr. Sochor's trial began on October 13, 1989, and the jury returned a verdict of guilty as charged as to both counts of the indictment on October 20, 1989 (R. 1189-1190).

At the penalty phase, the jury recommended death (R. 1225). The trial court subsequently sentenced Mr. Sochor to death on November 2, 1989 (R. 1237-1238).

The trial court found the following aggravating circumstances: (1) prior violent felony; (2) the crime was committed during the course of a felony, kidnapping and the uncharged crime of sexual battery; (3) heinous,

atrocious, or cruel; and (4) cold, calculated, and premeditated manner (R. 1231-1236).

The trial court found no statutory or non-statutory mitigating circumstances (R. 1231-1236).

On direct appeal, this Court struck the "cold, calculated and premeditated" aggravating circumstance while affirming Mr. Sochor's convictions and death sentence. Sochor v. State, 580 So. 2d 595 (Fla. 1991).

The United States Supreme Court granted certiorari, vacated Mr. Sochor's death sentence, and remanded the case to this Court because it had failed to conduct an adequate harmless error analysis. Sochor v. Florida, 112 S. Ct. 2114 (1992).

On remand, this Court again affirmed Mr. Sochor's death sentence. Sochor v. State, 619 So. 2d 285 (Fla. 1993). The United States Supreme Court denied certiorari. Sochor v. Florida, 114 S. Ct. 638 (1993).

Mr. Sochor filed his original Rule 3.850 motion for post conviction relief on July 15, 1995. Pursuant to with Circuit Court's directions, Mr. Sochor filed an amended

Rule 3.850 Motion on January 20, 1998. After a hearing pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993), the court granted an evidentiary hearing on some claims and denied others. The evidentiary hearing was conducted in April, 1999. Mr. Sochor filed his post-hearing memorandum on July 30, 1999; the State filed its memorandum on August 2, 1999. On March 28, 2001, the Circuit Court entered its order of denial. Mr. Sochor appealed, and his Initial Brief is being filed simultaneously with this Court.

CLAIM I

APPELLATE COUNSEL FAILED TO RAISE ON APPEAL NUMEROUS MERITORIOUS ISSUES WHICH WARRANT REVERSAL OF EITHER OR BOTH THE CONVICTION AND SENTENCE OF DEATH.

A. INTRODUCTION

Mr. Sochor had the constitutional right to the effective assistance of counsel for purposes of presenting his direct appeal to this Court. Strickland v. Washington, 466 U.S. 668 (1984). "A first appeal as of right [ ] is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." Evitts v. Lucey, 469 U.S. 387, 396 (1985). The Strickland test applies equally to ineffectiveness allegations of trial counsel and appellate counsel. See Orazio v. Dugger, 876 F. 2d 1508 (11th Cir. 1989).

Because the constitutional violations which occurred during Mr. Sochor's trial were "obvious on the record" and "leaped out upon even a casual reading of the transcript," it cannot be said that the "adversarial testing process

worked in [Mr. Sochor's] direct appeal." Matire v. Wainwright, 811 F. 2d 1430, 1438 (11th Cir. 1987). The lack of appellate advocacy on Mr. Sochor's behalf is identical to the lack of advocacy present in other cases in which this Court has granted habeas corpus relief. Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985). Appellate counsel's failure to present the meritorious issues discussed in this petition demonstrates that his representation of Mr. Sochor involved "serious and substantial deficiencies." Fitzpatrick v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986). Individually and "cumulatively," Barclay v. Wainwright, 477 So. 2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So. 2d at 1165 (emphasis in original). In light of the serious reversible error that appellate counsel never raised, there is more than a reasonable probability that the outcome of the appeal would have been different, and a new direct appeal must be ordered.

B. MR. SOCHOR'S TRIAL COURT PROCEEDINGS WERE FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS MERITORIOUS ISSUE.

Mr. Sochor did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. See Heath v. Jones, 941 F. 2d 1126 (11th Cir. 1991); Derden v. McNeel, 938 F. 2d 605 (5th Cir. 1991). Due process was deprived because the sheer number and types of errors involved in his trial, when considered as a whole, virtually dictated the sentence that he would receive.

In Jones v. State, 569 So. 2d 1234 (Fla. 1990), this Court vacated a capital sentence and remanded for a new sentencing proceeding before a jury because of "cumulative errors affecting the penalty phase." Id. at 1235 (emphasis added). In Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990), cumulative prosecutorial misconduct was the basis for a new trial. When cumulative errors exist the

proper concern is whether:

> even though there was competent substantial evidence to support a verdict...and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors was such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation.

Jackson v. State, 575 So. 2d 181, 189 (Fla. 1991). See also Ellis v. State, 622 So. 2d 991 (Fla. 1993) (new trial ordered because of prejudice resulting from cumulative error); Taylor v. State, 640 So. 2d 1127 (Fla. 4th DCA 1994).

This Court has consistently emphasized the uniqueness of death as a criminal punishment. Death is "an unusually severe punishment, unusual in its pain, in its finality, and in its enormity." Furman v. Georgia, 408 U.S. 238, 287 (1972) (Brennan, J., concurring). It differs from lesser sentences "not in degree but in kind. It is unique in its total irrevocability." Id. at 306 (Stewart, J., concurring). The severity of the sentence "mandates

careful scrutiny in the review of any colorable claim of error." Zant v. Stephens, 462 U.S. 862, 885 (1983). Accordingly, the cumulative effects of error must be carefully scrutinized in capital cases.

A series of errors may accumulate a very real, prejudicial effect. The burden remains on the state to prove beyond a reasonable doubt that the individual and cumulative errors did not affect the verdict and/or sentence. Chapman v. California, 386 U.S. 18 (1967); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); Larkins v. State, 655 So. 2d 95 (Fla. 1995).

The flaws in the system which convicted Mr. Sochor of murder and sentenced him to death are many. They have been pointed out throughout not only this Petition, but also in Mr. Sochor's direct appeal; and while there are means for addressing each individual error, the fact remains that addressing these errors on an individual basis will not afford adequate safeguards against an improperly imposed death sentence -- safeguards which are required by the Constitution.

These errors cannot be harmless. The results of the trial and sentencing are not reliable. Appellate counsel was ineffective for failing to raise this issue. Habeas Corpus relief must issue.

C. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ENSURE A COMPLETE APPELLATE RECORD

Appellate counsel for Mr. Sochor failed to ensure that a complete record of the lower court proceedings was compiled. Critical transcripts of proceedings from the record on appeal were omitted from Mr. Sochor's record. Several of these omissions are material to Mr. Sochor's claims. For example, at least two bench conferences were not recorded by the court reporter. Though some efforts were made by trial and appellate counsel to supplement the record, it is impossible to accurately determine what occurred due to inaccurate incomplete court reporting of Mr. Sochor's capital murder trial. Appellate counsel was therefore prevented from rendering effective assistance in the in the absence of a complete record. Moreover this Court's review could not be constitutionally complete.

See Parker v. Dugger, 111 S. Ct. 731 (1991). Habeas Corpus Relief is warranted.

CLAIM II

THIS COURT DID NOT CONDUCT A PROPER HARMLESS ERROR ANALYSIS ON REMAND AS REQUIRED BY THE CONSTITUTION OF THE UNITED STATES AND BY THE ORDER OF THE UNITED STATES SUPREME COURT.

In his sentencing order, the trial court found and considered the "cold, calculated and premeditated" aggravating circumstance despite the lack of any evidence to support the finding. On direct appeal, this Court struck the "cold, calculated and premeditated" aggravating circumstance while affirming Mr. Sochor's convictions and death sentence. Sochor v. State, 580 So. 2d 595 (Fla. 1991).

The United States Supreme Court granted certiorari, vacated Mr. Sochor's death sentence, and remanded the case to this Court with specific instructions to conduct an

adequate harmless error analysis:

> Since the Supreme Court of Florida did not explain or even "declare a belief that" this error "was harmless beyond a reasonable doubt" in that "it did not contribute to the [sentence] obtained," Chapman, supra, 386 U.S. at 274, the error cannot be taken as cured by the State Supreme Court's consideration of the case. It follows that Sochor's sentence cannot stand on the existing record of appellate review. We vacate the judgment of the Supreme Court of Florida, and remand the case for proceedings not inconsistent with this opinion.

Sochor v. Florida, 112 S. Ct. 2114, 2123 (1992). Justice O'Connor, concurring in the judgment of the Court, gave additional direction to this Court:

> ...I do not understand the Court to say that the mere addition of the words "harmless error" would have sufficed to satisfy the dictates of Clemons.

Sochor v. Florida, 112 S. Ct. 2114, 2124 (1992).

This Court's harmless error analysis on remand from the United States Supreme Court was Eighth and Fourteenth Amendment error. The harmless error test was set forth in

Chapman v. California, 386 U.S. 18 (1967). In order for constitutional error to be harmless, the state must show "beyond a reasonable doubt that the error complained of did not contribute to the [outcome] obtained." Yates v. Evatt, 111 S. Ct. 1884 (1991), citing Chapman v. California. The burden is on the state to show the harmlessness of the error and to overcome a presumption of harm. Arizona v. Fulminante, 111 S. Ct. 1246 (1991). If there is a reasonable possibility that the constitutional error might have contributed to the jury's recommendation, the error is not harmless beyond a reasonable doubt and Mr. Sochor is entitled to relief. Chapman v. California; Yates v. Evatt.

Florida adopted the Chapman test in State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), which held that the state as beneficiary of the error must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict, or alternatively stated, that there is no reasonable possibility that the error contributed to the conviction or sentence.

This Court failed to follow the direction of the United States Supreme Court and as result Mr. Sochor's sentence of death violates the Eighth and Fourteenth Amendments to the United States Constitution. This Court only reviewed this federal constitutional error under standards of state law. It found that absent the invalid aggravator the there was no likelihood of a different sentence. Sochor v. State, 619 So.2d 285, 293 (Fla. 1993). The Court's analysis implacably assumed the jury's death recommendation was valid and binding upon the sentencing judge unless the override standard was met. This Court cited only state law decisions for this standard. In fact the Court did not even cite State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), which requires a Chapman analysis of federal constitutional error. The United States Supreme Court specifically required this Court to determine whether, beyond a reasonable doubt, the aggravator did not contribute to the sentence.

This Court has failed to conduct a proper analysis as required by the United States Supreme Court and the United

States Constitution. Had it conducted a proper analysis of harmless error under Chapman it would have recognized the harmfulness of the error. Even though this Court had found that there was no evidence to support the aggravating circumstance, the trial court gave the cold, calculated and premeditated factor great weight in its sentencing order (R. 1232). It relied upon a tainted jury recommendation of death. Obviously the trial court did not understand this vague instruction since he found it to exist even though there was no evidence to support it. The jury also relied on this vague instruction.

Since Mr. Sochor's sentence rests upon an invalid aggravating circumstance and instruction, unsupported by any evidence, habeas corpus relief must be granted.

CLAIM III

MR. SOCHOR WAS DENIED HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WHEN THE JURY RECEIVED AN INSTRUCTION WHICH VIOLATED ESPINOSA V. FLORIDA

Mr. Sochor's sentencing jury was given the following instruction regarding the heinous, atrocious, or cruel

aggravating circumstance:

> [T]he crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel.

(R. 1221).

The instruction read to Mr. Sochor' jury was unconstitutionally vague. Maynard v. Cartwright, 486 U.S. 356 (1988); Espinosa v. Florida, 112 S. Ct. 2926 (1992). The jury as a co-sentencer must be adequately instructed. Kearse v. State, 622 So. 2d 677 (Fla. 1995).

This instruction was not a correct statement of the law under State v. Dixon, 283 So. 2d 1 (Fla. 1973) and it failed to fully instruct the jury.

The heinous, atrocious and cruel aggravating circumstance was improperly instructed to the jury and found by the court. The jury was not told that the "heinous, atrocious or cruel" aggravator only applies where evidence shows beyond a reasonable doubt that the defendant knew or intended the murder to be especially heinous, atrocious or cruel because the murder exhibits a desire to inflict a high degree of pain, or an utter

indifference to or enjoyment of the suffering of another. Kearse v. State, citing Chesire v. State, 568 So. 2d 908 (Fla. 1990) ("The factor of heinous, atrocious or cruel is proper only in torturous murders -- those that evidence extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another"). Here, the jury did not receive an instruction regarding the limiting construction of this aggravator nor was it applied by the sentencing court (R. 1232-33). Also this aggravator was not supported by the evidence presented at trial.

The "heinous, atrocious, and cruel" aggravator and instruction does not apply unless evidence was presented to demonstrate an intent on the defendant's part to inflict a high degree of pain or to otherwise torture the victims. Stein v. State, 632 So. 2d 1361 (Fla. 1994). This narrowing construction has repeatedly been required by this Court. Bonifay v. State, 626 So. 2d 1310, 1313 (Fla. 1993); Santos v. State, 591 So. 2d 160, 163 (Fla.

1991); Omelus v. State, 584 So. 2d 563, 566 (Fla. 1991); Chesire v. State, 568 So. 2d 908, 912 (Fla. 1990); Amoros v. State, 531 So. 2d 1256, 1260 (Fla. 1988); Lewis v. State, 377 So. 2d 640, 646 (Fla. 1979). See also Scull v. State, 533 So. 2d 1137 (Fla. 1988)(heinous, atrocious or cruel was not established as to victim who died from blow to head by a baseball bat); Rhodes v. State, 547 So. 2d 1201, 1208 (Fla. 1989) (victim died from "manual strangulation;" however "we decline to apply this aggravating factor in a situation in which the victim who was strangled, was semiconscious during the attack. Additionally, nothing about the commission of this capital felony `to set the crime apart from the norm of capital felonies'").

The state did not indicate to the jury that this narrowing construction existed and was constitutionally required, and the Judge did not consider it in his sentencing order. The state ignored its obligation to prove an element of this aggravator.

To the extent that trial or appellate counsel failed

to adequately preserve this issue or failed to raise it Mr. Sochor was denied effective assistance of counsel. Mr. Sochor is entitled to Habeas Corpus relief.

CLAIM IV

MR. SOCHOR WAS DENIED A PROPER DIRECT APPEAL OF HIS CONVICTION AND DEATH SENTENCE, CONTRARY TO FLORIDA LAW AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, DUE TO OMISSIONS IN THE RECORD.

The beginning point for any meaningful appellate review process is absolute confidence in the completeness and reliability of the record. The appeal of any criminal case assumes that an accurate transcript and record will be provided counsel, appellant and the appellate court. Mayer v. Chicago, 404 U.S. 189, 195 (1971); Entsminger v. Iowa, 386 U.S. 748, 752 (1967). Eighth Amendment considerations demand even greater precautions in a capital case. See, Penry v. Lynaugh, 488 U.S. 74 (1989); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S. 280 (1976); Proffitt v. Florida, 428 U.S. 242 (1976);

Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972).

Full appellate review of proceedings resulting in a sentence of death is required in order to assure that the punishment accorded to the capital defendant comports with the Eighth amendment. See, Proffitt v. Florida; Dobbs v. Zant, 113 S. Ct. 835 (1993), Johnson v. State, 442 So. 2d 193 (Fla. 1983)(Shaw, J. dissenting); Ferguson v. State, 417 So. 2d 639 (Fla. 1982); Swann v. State, 322 So. 2d 485 (1975); Art. V, 3(b)(1) Fla. Const.; 921.141(4) Fla. Stat. (1985). Indeed, Florida law insists upon review by the Supreme Court "of the entire record." Fla. Stat. 921.141(4) (1985) (emphasis added). In Florida capital cases, the chief circuit judge is required "to monitor the preparation of the complete record for timely filing in the Supreme Court." Fla. R. App. P. 9.140(b)(4) (emphasis added).

Critical transcripts of proceedings from the record on appeal were omitted from Mr. Sochor's record. Several of these omissions are material to Mr. Sochor's claims. For

example, at least two bench conferences were not recorded by the court reporter. Though efforts were made by trial and appellate counsel to supplement the record, Counsel cannot accurately determine what occurred due to inaccurate incomplete court reporting of Mr. Sochor's capital murder trial. Appellate counsel was therefore prevented from rendering effective assistance in the in the absence of a complete record. Moreover this Court's review could not be constitutionally complete. See, Parker v. Dugger, 111 S. Ct. 731 (1991).

The trial judge was required to certify the record on appeal in capital cases. 921.141(4) Fla. Stat. (1996). When errors or omissions appear, as here, re-examination of the complete record in the lower tribunal is required. Delap v. State, 350 So. 2d 462 (Fla. 1977).

CLAIM V

FLORIDA'S CAPITAL SENTENCING STATUTE VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS UNDER APPRENDI V. NEW JERSEY AND RING V. ARIZONA.

A. INTRODUCTION

Ring v. Arizona, 536 U.S. ____, (2002), held unconstitutional a capital sentencing scheme that makes imposing a death sentence contingent upon the finding of an aggravating circumstance and assigns responsibility for finding that circumstance to the judge. The United States Supreme Court based its holding and analysis in Ring on its earlier decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), in which 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, 252-253 (1999) (Stevens, J., concurring)). Capital 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, slip op. at 19 (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, slip op. at 16 (quoting Apprendi, 530 U.S. at 494). The question is not whether death is an authorized punishment in first-degree murder cases,[1] but whether the "facts increasing punishment beyond the maximum authorized by a guilty verdict standing alone," Ring, slip op. at 19, 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, slip op. at 16. "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, 530 U.S. at 499 (Scalia, J., concurring)).

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[1] See Ring, slip op. At 17-18 (rejecting argument that finding of aggravating circumstances did not increase statutory maximum because the "Arizona first-degree murder statute `authorizes a maximum penalty of death only in a formal sense'" (quoting Apprendi, 530 U.S. at 541 (O'Connor, J., concurring)). Both the Florida and Arizona statutes provide for a range of punishments, the most severe of which is death. Compare Fla. Stat. §775.082(1)(1979) with Arizona Rev. Stat. Ann. §13-1105(C).

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, slip op. at 9 (internal quotation marks and citations omitted). In so holding, 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, slip op. at 22.

B. APPLYING RING TO FLORIDA'S SENTENCING SCHEME

This Court 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 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, slip op. at 11 (quoting Walton, 497 U.S. at 648, in turn quoting Hildwin, 490 U.S. at 640-641). Ring undermines this Court's decision in Mills by recognizing (a) that Apprendi applies to capital sentencing schemes,[2] Ring, slip op. at 2 ("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

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[2] In Mills, the Florida Supreme Court said that "the plain language of Apprendi indicates that the case is not intended to apply to capital [sentencing] schemes." Mills, 786 So. 2d at 537. In Bottoson v. Moore, Case No. SC02-1455, Order Granting Stay of Execution and Setting Oral Argument, (July 8, 2002), Justice Pariente in her concurring opinion conceded that the Florida Supreme Court's opinion in Mills was 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." She continued to say that based on the opinion in Ring, "we now know that we were wrong." See, Order at 7. Justice Pariente acknowledged that "Ring has raised questions concerning the Supreme Court's longstanding precedent in death penalty cases." Order at 4.

not avoid the Sixth Amendment requirements of Apprendi by simply "specif[ying] 'death or life imprisonment' as the only sentencing options," Ring, slip op. at 17, and (c) that the relevant and dispositive question is whether under state law death is "authorized by a guilty verdict standing alone," Ring, slip op. at 19.[3]

Florida's capital sentencing statute, like the Arizona statute struck down in Ring, makes imposing the death penalty contingent on the factual findings of a judge, not the jury. §775.082 of the Florida Statutes provides that a person convicted of first-degree murder must be sentenced to life in prison "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, and in the latter event such person shall be punished by death." For nearly 30

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[3] Indeed, as Justice Pariente said in her concurring opinion in Bottoson v. Moore, Case No. SC02-1455, Order Granting Stay of Execution and Setting Oral Argument (July 8, 2002), "Until now our jurisprudence has only ever discussed Apprendi – it has never discussed Ring. Thus, it is this Court's responsibility to explain Florida's sentencing scheme through the lens of Ring and not through the lens of Apprendi." Id. at 11.

years, this Court has held that §§775.082 and 921.141 do not allow imposing a death sentence upon a jury's verdict of guilt, but only upon a finding of sufficient aggravating circumstances. State v. Dixon, 283 So. 2d 1, 7 (Fla.1973)(Question of punishment is reserved for a post conviction hearing").

The "explicitly cross reference[d] statutory provision" requiring the finding of an aggravating circumstance before imposition of the death penalty," Ring, slip op. at 18, 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). §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. Id. Second, the judge must find that "sufficient aggravating circumstances exist" to justify imposition of the death

penalty.[4] 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 sec. 775.082." Id.

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

C. 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's death penalty statute differs from Arizona 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

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[4] The jurors need only find sufficient aggravating circumstances to "recommend" an "advisory sentence" of death. Fla. Stat. §921.141 (2).

sentencing process is insignificant under Apprendi and Ring, however. First, whether one looks to the plain meaning of Florida's death penalty statute, or this Court's 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 this jury." 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. Fla. Stat. §921.141 (2) and

(3). Because Florida law does not require that any number 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 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. This Court has made the point even more strongly by repeatedly emphasizing 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)(collecting cases). 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 on evidence not submitted to the jury. Porter v. State, 400 So. 2d 5 (Fla. 1981); Davis v. State, 703 2d 1055, 1061 (Fla. 1997). The judge also is permitted to consider and rely upon aggravating circumstances that were not submitted to the jury. Davis, 703 So. 2d at 1061, citing Hoffman v. State, 474 So. 2d 1178 (Fla. 1985)(court's finding of "heinous, atrocious, or cruel" aggravating circumstance proper though jury was not instructed on it); Fitzpatrick v. State, 437 So. 2d 1072, 1078 (Fla. 1983)(finding of previous conviction of violent felony was proper even though jury was not instructed on it) Engle, supra, 438 So. 2d at 813.

Because, in Florida, 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 on the judge's written findings. 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.

Moreover, it would be impermissible and unconstitutional to rely on the jury's advisory sentence as the basis for fact findings required for a death sentence because the statutes requires only a majority vote of the jury in support of that advisory sentence. See id. ('recommendation of a majority of the jury'). In Harris v. United States 2002 WL 1357277, No. 00-10666 (U.S. June 24, 2002), decided 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." Id. at 14. 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. 2002

WL 1357257 at 16. Based on the reasoning in Apprendi, Jones and Ring, aggravating factors are equivalent to elements of the capital crime itself and must be treated as such.

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, slip op. at 23 (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. §921.141(2) does not call for a jury verdict, but rather an "advisory sentence." This 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 (emphasis original in Combs). "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 herself bound to follow a jury's recommendation and thus "not make an independent ruling 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. Fla. Stat. §921.141(3). In contrast, no 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. Sochor's case required that all jurors concur in finding any particular aggravating circumstances, or "[w]hether sufficient aggravating circumstances exist," or "[w]hether sufficient mitigating circumstances exist which outweigh the aggravating circumstances." Fla. Stat. §921.141(2).

Because Florida law does not require all jurors to agree that the State has proved any aggravating circumstance beyond a reasonable doubt or to agree on the

same aggravating circumstances 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, Combs, 525 So. 2d at 859 (Shaw J. concurring).

The State was not required to convince the jury that death was a proper sentence beyond a reasonable doubt. The jury in Mr. Sochor's case was not required to make 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, slip op. at 16. 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).

In the plain language of Florida's death penalty statute, the rules of criminal procedure and twenty years of 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 this Court were to redefine the jury's role under Florida law, it would not make Mr. Sochor's death sentence valid. Mr. Sochor's jury was repeatedly told that it was decision was merely "advisory" (R. 950) and that "the final decision as to what punishment shall be imposed is the responsibility of the Judge" (R. 1880, R. Supp. 44, 45, 50, 51, 70).

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 now conclude that Mr. Sochor's death
sentence rests on findings made by the jury after they were told, that Florida law clearly provided that a death sentence would not rest upon their recommendation, it would establish that Mr. Sochor's 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, slip op. at 6 (Breyer, J.)

D. MR. SOCHOR'S DEATH SENTENCE IS INVALID BECAUSE THE ELEMENTS OF THE OFFENSE NECESSARY TO ESTABLISH CAPITAL MURDER WERE NOT CHARGED IN THE INDICTMENT.

In Jones v. United States, 526 U.S. 227 (1999), the United States Supreme Court 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 the indictment, submitted to a jury, and proven beyond a reasonable doubt." Jones, at 243, n. 6. Apprendi v. New Jersey, 530 U.S. 466 (1999), held that the Fourteenth Amendment affords citizens the same protections when they are prosecuted under state law. Apprendi, 530 U.S. at 475-476.[5]

Ring v. Arizona, 536 U.S. __(2002) held that a death penalty statute's "aggravating factors operate as 'the functional equivalent of an element or a greater offense.'" Ring, slip op. at 23 (quoting Apprendi, 530 U.S. at 494, n. 19). In Jones, the Supreme Court noted that "[m]uch turns on the determinations 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.

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

3d 741 (8th Cir. 2001) was overturned when the Supreme Court granted the writ of certiorari, vacated the judgment of 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, No. 01-7310, 2002 U.S. LEXIS 4893 (June 28, 2002).

The question in Allen was presented as:

> Whether aggravating factors required for a sentence of death under the Federal Death Penalty Act of 1994, 18 U.S.C. Section 3591 et seq., are elements of a capital crime and thus must be alleged in the indictment in order to comply with 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, §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 and 3592(c), Florida's death penalty statute, Florida Statute §§775.082 and 921.141, makes imposing 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 the indictment. In State v. Dye, 346 So. 2d 538 (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), this Court said "[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 state, including "by habeas corpus." Gray, 435 So. at 818. Finally, in Chicone v. State, 684 So. 2d 736, 744 (Fla. 1996), this Court said "[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 States 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. Sochor with a crime punishable by death.

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 (1984), and DeJonge 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. Sochor's right under Article I, §15 of the Florida Constitution and the Sixth Amendment to the United States Constitution were violated. By omitting any reference to the aggravating circumstance that would be relied upon by the State in seeking a death sentence, the indictment prejudicially hindered Mr. Sochor "in the preparation of a defense," to a sentence of death. Fla. R. Crim. P. 3.140(o).

E. MR. SOCHOR'S 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 imposing the death penalty. Fla. Stat. §921.141(3). Because imposing

a death sentence is contingent on this fact being found, and the maximum sentence that could be imposed in the absence of that finding is life in prison, the Sixth Amendment required that the State bear the burden of proving it beyond a reasonable doubt. Ring, slip op. at 2. ("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. Sochor's jury, are routinely instructed, "Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances do exist that outweigh the aggravating circumstances" (R. 1220).

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-

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. Sochor's jury violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution and the Sixth Amendment's right to trial by jury because it relieves the State of its burden to prove beyond a reasonable doubt the element that "sufficient aggravating circumstances" exist that 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 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., 421 U.S. 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. 421 U.S. at 698. The Supreme Court held that the statutory scheme unconstitutionally relieved the state of its burden to prove the element of intent. Id. 421 U.S. 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 worse offenders, Florida adopted Fla. Stat. 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 circumstance from those for whom "sufficient aggravating circumstances" do not outweigh the mitigating circumstances. Id., 283 So. 2d at 8. Because the former are more culpable, they are subjected to the most severe punishment: death. "By drawing the distinctions, 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. Sochor's jury was never required to find the element of sufficient aggravating circumstances beyond a reasonable doubt, the error here cannot be subjected to a harmless error analysis. Sullivan v. Louisiana, 508 U.S. 275, 279-280 (1993). Mr. Sochor is entitled to relief.

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus has been furnished by United States Mail, first class postage prepaid, to Celia Terenzio, Assistant Attorney General, 1515 North Flagler Drive, 9th Floor, West Palm Beach, Florida 33401-3432, on August 12, 2002.

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

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