NO.SC02-2643

MICHAEL MORDENTI

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. Mordenti'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. Mordenti was deprived of the right to a fair, and reliable capital trial and penalty phase. The proceedings that resulted in Mr. Mordenti's convictions and death sentence violated fundamental constitutional imperatives. Additionally, appellate counsel rendered ineffective assistance of counsel resulting in the denial of a constructionally reliable direct appeal to which Mr. Mordenti is entitled.

Citations shall be as follows: The record on appeal from Mr. Mordenti's trial shall be referred to as "R.___". The record on appeal from the denial of Mr. Mordenti's post conviction motion will be referred to as "PCR.___" and the transcript from the evidentiary hearing: "PC-T.___". All other references will be self-explanatory or otherwise explained herein.

INTRODUCTION

Significant errors which occurred at Mr. Mordenti's capital trial and sentencing were not presented to this Court on direct appeal due to the ineffective assistance of

appellate counsel.

Additionally, fundamental error occurred rendering Mr. Mordenti's convictions and death sentence unconstitutional. For example, plain error occurred on direct appeal when this Court relied upon incorrect "facts". Accordingly, Mr. Mordenti's sentence of death violates the Sixth Amendment to the United States Constitution and appellate counsel rendered ineffective assistance of counsel in failing to raise egregious and improper prosecutorial argument - argument that rose to the level of fundamental error. Other errors include juror misconduct. Appellate counsel's failure to present the meritorious issues discussed in this petition demonstrates that his representation of Mr. Mordenti involved "serious and substantial deficiencies." Fitzpatrick v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986). The issues which appellate counsel neglected demonstrate that counsel's performance was deficient and that the deficiencies prejudiced Mr. Mordenti. "[E]xtant legal principles . . . provided a clear basis for . . . compelling appellate arguments]." Fitzpatrick, 490 So. 2d at 940. Neglecting to raise the issues such as those discussed herein "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Wilson v. Wainwright, 474 So. 2d 1162, 1164 (Fla. 1985). Additionally, fundamental error occurred reaching down into the validity of the proceedings. Kilgore v. State, 688 So. 2d 895 , 898 (Fla. 1996).

Individually and "cumulatively," Barclay v. Wainwright, 444 So. 2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So. 2d at 1165 (emphasis in original). As this petition will demonstrate, Mr. Mordenti is entitled to habeas relief.

REQUEST FOR ORAL ARGUMENT

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

PROCEDURAL HISTORY

The Circuit Court for the Thirteenth Judicial Circuit, in and for Hillsborough County, Florida, entered the judgment of convictions and death sentence at issue.

Mr. Mordenti was indicted by a grand jury in Hillsborough County, Florida, on March 14, 1990 (R. 1591-1593). He was charged with first-degree murder and conspiracy to commit first degree murder. Jury trial commenced July 8, 1991. The jury found Mr. Mordenti guilty of both counts. The penalty phase took place on July 29, 1991. The jury rendered a death recommendation by a vote of 11 to 1 (R. 1499) and on September 6, 1991, the Court sentenced Mr. Mordenti to death (R. 1547). The trial court entered written findings (R. 1774). A timely direct appeal was filed in this Court which affirmed Mr. Mordenti's convictions and sentences. Mordenti

v. State, 630 So. 2d 1080 (Fla. 1994).[1] Mr. Mordenti filed a petition for writ of certiorari in the United States Supreme Court, which was denied on June 20, 1994. Mordenti v. Florida, 114 S. Ct. 2726 (1994). Because Mr. Mordenti's conviction and sentence became final after January 1, 1994, Mr. Mordenti was required to file his motion for post-conviction relief within one (1) year pursuant to the newly-enacted Rule 3.851. This Court granted Mr. Mordenti an extension of time in which to file the his initial post conviction motion, ordering that Mr. Mordenti file by September 5, 1995. Mordenti v. State, No. 78,753 (Fla. Oct. 11, 1994) (order granting extension of time). On August 29, 1995, counsel for Mr. Mordenti filed in a Motion for Extension of Time in Which to File Motion to Vacate Judgment and Sentence Pursuant to Rule 3.850 in this Court. The State of Florida filed no response. No order had issued, thus, Mr.

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[1]The following issues were raised: 1) Trial court error in failing to require that one of the prosecutors (husband and wife team) remove him or herself from the case; 2) trial court error in failing to replace juror whose employer required him to work until midnight after trial each day; 3) trial court error in allowing testimony of victim's mother as to deceased's identity and admitting highly prejudicial photographs; 4) trial court error in admitting evidence alleging Mr. Mordenti's prior involvement in crime; 5) trial court violated Eighth and Fourteenth Amendments in instructions on HAC aggravating factor; 6) Trial court error in permitting prosecutor's reference to Mr. Mordenti as a con artist during penalty phase; 7) trial court error when it permitted the state to threaten to rebut defense proof of no significant history of criminal activity with alleged evidence of uncharged non criminal behavior; 8) trial court error in instructions given on CCP aggravating factor; 9) Death penalty disproportionate.

Mordenti filed his incomplete motion in order to comply with the September 5, 1995, deadline.

On September 30, 1996, the circuit court summarily denied Mr. Mordenti's post conviction motion and Mr. Mordenti timely appealed to this Court which remanded the matter to the lower Court. Mordenti v. State, 711 So.2d 30 (Fla. 1998).

Karen Cox prosecuted Mr. Mordenti and Mr. Mordenti's post conviction motion raised issues of similar tactics and prosecutorial misconduct.

On April 11, 2000, the lower court held a status conference at which the filing date of Mr. Mordenti's amended Rule 3.850 motion was set for June 30, 2000. Mr. Mordenti timely filed his amended Rule 3.850 motion on June 30, 2000 (PCR. 488-669).

On October 19, 2000, the lower court held a hearing pursuant to Huff v. State,622 So.2d 982 (Fla. 1993). On December 8, 2000 the lower court entered its Order Granting, In Part, and Denying, In Part, Amended Motion to Vacate Judgments of Convictions and Sentences (PCR. 1182). The lower court granted Mr. Mordenti an evidentiary hearing be held on claims I (Ineffective Assistance of Counsel at the guilt/innocence phase), III (denial of due process and a full adversarial testing due to Brady and Giglio violations); XIII (denial of full adversarial testing at the penalty phase due to Brady and Giglio violations and/or ineffective assistance of trial counsel); and XXXI (court proceedings fraught with

procedural and substantive errors). The lower court summarily denied the remaining claims.[2]

On August 21, 2001, Mr. Mordenti filed his Second Amended Motion to Vacate Judgments of Conviction and Sentence due to the fact that after the Huff hearing, additional material was disclosed by the State (PCR. 1238-1241). In that pleading, Mr. Mordenti amended claims I, II, III, XII and XXXII. On

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[2]These claims are: II (Newly Discovered Evidence Established that Mr. Mordenti's conviction and sentence of constitutionally unreliable); IV (Admission of hearsay evidence unconstitutionally permeated the trial); V (Omissions in the record result in an unreliable transcript); VI (Gruesome and shocking photographs were unconstitutionally admitted at trial); VIII (Denial of effective assistance of counsel due counsel's failure to know case law regarding State v. Neil, State v. Slappy, and Batson v. Kentucky); IX (the state violated Mr. Mordenti's right to remain silent and Mr. Mordenti's purported statements were unconstitutionally admitted at trial); X (trial court erred in instructing the jury on standard to judge expert testimony); XII, (misleading testimony and improper prosecutorial argument); XIV,(Inflammatory and improper prosecutorial argument rendered death sentence fundamentally unfair); XV (trial court's refusal to find and weigh mitigation set out in the record); XVI (non-statutory aggravating factors considered); XVII(failure to present Skipper evidence deprived Mr. Mordenti of a reliable sentencing determination); XVIII (CCP aggravating factor is unconstitutionally vague and jury improperly instructed); XIX (fundamental error occurred when trial court instructed jury on HAC aggravator); XX (sentencing jury misled regarding responsibility in sentencing determination); XXI (trial court improperly shifted burden to Mr. Mordenti to prove life appropriate sentence); XXII (Florida's statute setting forth aggravating factors is unconstitutionally vague and over broad); XXIII (Innocence of the death penalty); XXIV (prosecutor impermissibly suggested death was required); XXV (prohibition against juror interviews); XXVI (Juror misconduct occurred during Mr. Mordenti's trial); XXVII Florida's sentencing statute is unconstitutional); XXVIII (incomplete 3.851 motion filed due time limitation, workloads); XXIX (access to files and records denied); XXX (time frame under Fla. R. 3.851 is unconstitutional).

August 28, 2001, the lower court entered its order regarding this motion and granted an evidentiary hearing as to the amendment of claims I and III and denied as it related to claims II, XII and XXXII (PCR. 1250-1254).

The evidentiary hearing on Mr. Mordenti's Post Conviction Motion was held on September 10-11.[3] The evidentiary hearing resumed November 5-7, and November 27, 2001. Pursuant to the lower court's order at the conclusion of the evidentiary hearing, written closing arguments were filed. On April 23, 2002, the lower court entered its order denying Mr. Mordenti relief (PCR. 1384-1425). Mr. Mordenti timely filed his Notice of Appeal on May 9, 2002 (PCR. 1426). Mr. Mordenti has simultaneously filed his Initial Brief regarding his appeal of the circuit court's denial of Fla. R. Crim. P. 3.850 relief with this Petition for Writ of 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. Mordenti's convictions and sentences of

[3]The proceedings were stopped and continued due to the September 11 terrorist attacks.

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. Mordenti's direct appeal. See Wilson, 474 So. 2d at 1163; Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Mordenti 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. Mordenti's claims.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Mordenti

asserts that is capital convictions and sentences of death were obtained and then affirmed during this Court's appellate review process in violation of his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

CLAIM I

PLAIN AND FUNDAMENTAL ERROR OCCURRED ON DIRECT APPEAL WHEN THIS COURT WAS MISINFORMED REGARDING EVIDENCE IN THE CASE AND MADE RULINGS ACCORDING TO THAT MISINFORMATION. APPELLATE COUNSEL ALSO RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN PROVIDING THIS COURT WITH INCORRECT FACTS. MR. MORDENTI WAS DENIED HIS CONSTITUTIONAL RIGHT TO A RELIABLE DIRECT APPEAL AS A RESULT.

In this Court's opinion on direct appeal, this Court stated:

> . . .Mordenti argues that a **cellmate** of Mordenti's should not have been allowed to testify that Mordenti let him know that Mordenti was "in the mob."
>
> * * *
>
> . . .we do find that it was error for Mordenti's **cellmate** to testify regarding Mordenti's purported "mob" association; however because defense counsel failed to request a mistrial, this claim is procedurally barred.
>
> * * *
>
> Further, this testimony was not emphasized and, even if the error were not barred, we find that the elimination of the **cellmate**'s testimony would not have changed the outcome of this proceeding and otherwise constituted harmless error.

Mordenti v. State, 630 So.2d 1080 at 1084-1085 (Fla. 1994) (emphasis added).

In fact, Horace Barnes was not a cellmate of Mr. Mordenti's. Rather, Horace Barnes was an individual whom Mr. Mordenti assisted the FBI in prosecuting for bank robbery (See PC-T. 233). Mr. Barnes, in prison for that bank robbery at the time of Mr. Mordenti's trial, testified against Mr. Mordenti and alleged that Mr. Mordenti made statements to him to the effect that he was "in the mob" and illegally sold guns. (R. 747). Reliance upon this incorrect information constitutes plain error and fundamental error not subject to harmless analysis. See, e.g., Reed v. State, ___ So. 2d ___; 2002 WL 31833870; slip op. at 2 (Fla. December 19, 2002).

Additionally, appellate counsel was also ineffective in the Initial Brief filed on direct appeal when arguing the error of the mob statement when appellate counsel suggested that Barnes and Mr. Mordenti were cellmates. Regarding the alleged statement by Mr. Mordenti to Barnes appellate counsel wrote: ". . .that he had introduced himself **(to someone in prison, perhaps when he himself was in prison?**) as someone "in the mob." See Initial Brief at 49 (parenthesis original)(emphasis added). Consequently, this Court relied upon this incorrect assertion when denying Mr. Mordenti's direct appeal. Appellate counsel rendered deficient performance in suggesting incorrect facts and Mr. Mordenti was prejudiced as a result because this Court relied on the incorrect information in denying Mr. Mordenti's appeal. Consequently, Mr. Mordenti was denied his right to a reliable

direct appeal.

Plain and fundamental error also occurred on direct appeal when this court stated: "For her testimony, Gail Mordenti was offered complete immunity." Mordenti v. State, 630 So.2d 1080 at 1083. Gail Mordenti Milligan, the state's key witness, however, was in fact only given use immunity (See PC-T. 252). Credibility issues are implicated when a witness is provided immunity in exchange for their testimony. The State's argument in closing bolstering Gail's testimony is also called into question. At trial, the prosecutor argued that Gail was worthy of belief because she had nothing to lose, she had immunity. This falsity was not corrected at trial or on appeal and constitutes plain and fundamental error. Reed v. State, ___ So. 2d ___; 2002 WL 31833870, Slip op. at 2. (Fla.) ("It is fundamental error if the inaccurately defined malice element is disputed, [ ] and the inaccurate definition 'is pertinent or material to what the jury must consider in order to convict.' [ ].) (internal citations omitted). Similarly, in Mr. Mordenti's case, evidence regarding Gail's immunity "is pertinent . . . to what the jury must consider in order to convict." Thus, the error is not subject to harmless error analysis. Accordingly, this Court's opinion in denying Mr. Mordenti's appeal is premised upon incorrect facts concerning a very significant witness in his trial. This constitutes plain and funadmental error. Mr. Mordenti has been denied the

constitutionally reliable direct appeal to which he is entitled. Habeas relief is proper. He is entitled to a new trial.

CLAIM II

FLORIDA'S CAPITAL SENTENCING PROCEDURE DEPRIVED MR. MORDENTI OF HIS SIXTH AMENDMENT RIGHTS TO NOTICE AND TO A JURY TRIAL AND OF HIS RIGHT TO DUE PROCESS.

Ring v. Arizona, 122 S. Ct. 2428(2002) overruled Walton v. Arizona, 497 U.S. 639 (1990), "to the extent that it allows a sentencing judge sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." Ring at 2443. The role of the jury in Florida's capital sentencing scheme, and in particular Mr. Mordenti's capital trial, neither satisfies the Sixth Amendment, nor renders harmless the failure to satisfy Apprendi v. New Jersey, 530 U.S. 466 (2000)and Ring.

On October 24, 2002, this Court rendered its decisions in Bottoson v. Moore, ___ So.2d ___, 2002 WL 31386790 (Fla. 2002) and King v. Moore, ___ So.2d ___, 2002 WL 313386234 (Fla. 2002) relating to the United States Supreme Court's decision in Ring and thus, its impact upon the constitutionality of Florida's death penalty sentencing scheme. Newspaper accounts notwithstanding, a careful reading of the various separate opinions in those published decisions establish that Mr. Mordenti is entitled to sentencing relief.

In both Bottoson v. Moore and King v. Moore, each justice wrote separate opinions explaining his or her reasoning for

denying both petitioners relief. In both decisions, a *per curiam* opinion announced the result. In neither case do a majority of the sitting justices join the *per curiam* opinion or its reasoning. In both cases, four justices wrote separate opinions explaining that they did not join the *per curiam* opinion, but "concur[red] in result only." Bottoson v. Moore, 2002 WL 31386790 at 2; King v. Moore, 2002 WL 31386234 at 1-2.[4]

When the four separate opinions that concur in result only are analyzed, it is clear that relief was denied in the two cases based upon facts present in those cases that are not present in Mr. Mordenti's case. Under the logic of those four separate opinions, concurring in result only, Mr. Mordenti is entitled to sentencing relief as a result of Ring v. Arizona.

1. **MR. MORDENTI'S CASE.**

With the four specially concurring opinions in mind, certain facts regarding Mr. Mordenti's case need to be highlighted.

The Judge's preliminary instructions to the jury included:

> . . . in [the] second phase **it would be necessary for you as a juror to make a recommendation to me as the judge as to the proper penalty** for Murder in the First Degree in this particular case.

[4]In many ways, the Bottoson v. Moore decision contains the primary opinions of the seven justices. This Court had seven participating justices in that decision, while in King v. Moore, Justice Quince was recused. Generally, the separate opinions in King rely upon the separate opinions in Bottoson as more fully reflecting the reasoning of its author.

(R. 52-35)(emphasis added). The judge continued the preliminary instructions with:

> **Your recommendation as to which penalty that I should impose as the judge**, either life in the Florida State Prison, or death by electrocution, is advisory in nature to me. **The ultimate decision as to the penalty will be left with me, as the Court**.

(R. 53)(emphasis added).

> So, let me go back again and ask that question. Are any of you opposed to the death penalty so that you could not impose the death penalty – **or recommend the imposition, I should say,** of the death penalty in a proper case?

(R. 56)(emphasis added).

The judge inquired of one juror:

> But I guess I need to ask you, regardless of what the evidence is that you hear presented during the trial, or what the evidence that you hear presented during the penalty phase; regardless of whatever evidence you hear, and whatever law I instruct you in, are you possessed of such strong feelings that in all instances, no matter what the evidence, that you would vote or **recommend against the death penalty.**

(R. 58)(emphasis added). The judge asked a similar question referring to the juror's ability to render a recommendation of two other jurors (R. 58; R. 59). Potential jurors stated their understanding of the judge's instructions. For example, one juror stated: "It would depend on the circumstances of the crime as to whether or not I would **recommend** the death penalty." (R. 176)(emphasis added)(See also R. 203; 205) and the judge again told several jurors that their duty was to make a "recommendation" (See e.g., R. 217) In fact the judge corrected one potential juror:

> PROSPECTIVE JUROR #11: Yeah, after the fact. I would have to be – **I'm not sure I could live with the fact of putting someone to death**.
>
> THE COURT: Okay. But then **keep in mind what you do is you make a recommendation. It's the judge's job to do the sentencing.**
>
> PROSPECTIVE JUROR #11: Okay.

(R. 218) (emphasis added). The judge did the same thing regarding prospective juror #13 (See R. 221: "It would be the judge's job to make that decision.").

The record also shows the prosecutor's penalty phase argument emphasized the juror's role was to provide a mere recommendation:

> The people of the State of Florida now come before you and **urge you to urge Judge Bucklew** to use that sword to impose capital punishment, the death penalty, on this defendant for what he did because justice demands it. There is no alternative in this case whatsoever for that murder. There is no alternative.

(R. 1456) (emphasis added).

While instructing the jurors prior to their sentencing deliberations, the judge gave the standard jury instructions. However, in the context of the proceedings in Mr. Mordenti's case, comments not a part of the instructions were reiterated and in essence incorporated by reference when the judge used the phrase, "as you have been told":

> It is now your duty as jurors to **advise** the Court as to what punishment should be imposed upon the Defendant, Michael Mordenti, for his crime of murder in the first degree.
>
> **As you have been told**, the final decision as to what punishment should be imposed is a responsibility of the Judge.

(R.1489)(emphasis added).

The jury was also instructed upon 3 aggravating circumstances. The totality of the instructions given the jury on these aggravating circumstances were:

> The aggravating circumstances which you may consider are limited to any of the following that are established by the evidence:
>
> Number one, the crime for which the defendant is to be sentenced was committed for financial gain;
> Number two, the crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel.
> Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others.
> The kind of crime intended to be included as heinous, atrocious or cruel is one accompanied by additional acts that show that the crime was conscienceless – conscienceless or pityless and was unnecessarily torturous to the victim.
> Three, 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.
> Cold, calculated and premeditated consists of a careful plan or prearranged design to kill. A pretense of moral or legal justification is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide.
>
> If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole for twenty-five years.
>
> Should you find sufficient aggravating circumstances to exist, then it will be your duty to determine whether mitigating circumstances exist to outweigh the aggravating circumstances.

(R. 1490-1492).

The jury was further advised that "In these proceedings it is not necessary that the verdict of the jury be unanimous" (R. 1495) but that:

> [i]f a majority of the jury determine that Michael Mordenti should be sentenced to death, your advisory sentence will be a majority of the jury by a vote of, advise and recommend to the Court that it impose the death penalty upon Michael Mordenti.

(Id.).

Thereafter, the jury's advisory verdict was returned and read in open court by the clerk:

> A majority of the jury, by a vote of eleven to one, advise and recommend to the Court that it impose the death penalty upon Defendant Michael W. Mordenti.

(R. 1499). On September 6, 1991, the presiding judge imposed a sentence of death (R. 1547). She found two aggravating circumstances: 1) the crime was committed for pecuniary gain; 2) the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (R. 1542-1543).[5]

As to mitigating circumstances, this Court observed,

> [the trial judge] found the following factors in mitigation: (1) that [Mr. Mordneti] was fifty a the time of the crime; (2) [Mr. Mordenti] had no significant history of prior criminal activity[6] (3) that [Mr. Mordenti's] father died while [he] was young and that he was abandoned by his mother; (4)

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[5]The judge did not rely upon the heinous, atrocious and cruel aggravating factor (R. 1543).

[6]This Court noted that the trial judge found this factor in mitigation even though the defense waived a jury instruction on this issue. Mordenti at 1083, footnote 2.

> that [Mr. Mordenti] was a good stepson to his stepparents; (5) that [Mr. Mordenti] supported the woman who lived with him and her two children; (6) that [Mr. Mordenti] was a thoughtful friend and employer and was fair in business dealings; (7) that [Mr. Mordenti] received an honorable discharge from the Coast Guard; and (8) that [Mr. Mordenti] behaved appropriately in court during the trial.

Mordenti v. State 630 So. 2d 1080, 1083.

2. **NO FINDING OF PRIOR CONVICTION OF A CRIME OF VIOLENCE.**

Mr. Mordenti's death sentence was not dependent upon the "previously convicted of a crime of violence" aggravating circumstance. Mr. Mordenti had no prior convictions for a crime of violence. The State made no argument that this aggravating circumstance was present. This is a distinction between Mr. Mordenti's case and the circumstances of both Bottoson v. Moore and King v. Moore, on a factor that three justices found served as a basis for denying relief in those two cases.

a. **Justice Shaw's views.**

For Justice Shaw, the finding of this aggravating circumstance in both the Bottoson and King cases was the basis for his vote to deny each of them relief. As Justice Shaw explained in his opinion concurring in the denial of habeas relief in Bottoson, "this particular factor is excluded from Ring's purview and standing by itself, can serve as a basis to 'death qualify' a defendant. Accordingly, I agree that Bottoson's petition for writ of habeas corpus must be denied." Bottoson v. Moore, 2002 WL 31386790 at 19 (Shaw, J.,

concurring in result only)(footnote omitted). In his opinion concurring in the denial of habeas relief in King, Justice Shaw indicated that habeas relief should be denied because King's sentence of death was based in part on the aggravating circumstance of "previous conviction of violent felony." King v. Moore, 2002 WL 31386234 at 4.

But for the presence of this aggravating factor, it appears from Justice Shaw's opinions that he would vote to grant a capital habeas petitioner relief on the basis of Ring v. Arizona. Justice Shaw expressed his view that the Florida death penalty statute violated the principle enunciated in Ring v. Arizona:

> Nowhere in Florida law is there a requirement that the finding of an aggravating circumstance must be unanimous. Ring, however, by treating a "death qualifying" aggravator as an element of the offense, imposes upon the aggravator the rigors of proof as other elements, including Florida's requirement of a unanimous jury finding. Ring, therefore, has a direct impact on Florida's capital sentencing statute.

Bottoson v. Moore, 2002 WL 31386790 at 18. At another point in his opinion, Justice Shaw concluded that Florida's statute was flawed:

> I read Ring v. Arizona, 122 S.Ct. 2428 (2002), as holding that "an aggravating circumstance necessary for imposition of a death sentence" operates as "the functional equivalent of an element of a greater offense than the one covered by the jury's verdict" and must be subjected to the same rigors of proof as every other element of the offense. Because Florida's capital sentencing statute requires a finding of at least one aggravating circumstance as a predicate to a recommendation of death, that "death qualifying" aggravator operates as the

> functional equivalent of an element of the offense and is subject to the same rigors of proof as the other elements. When the dictates of Ring are applied to Florida's capital sentencing statute, I believe our statute is rendered **flawed** because it lacks a unanimity requirement for the "death qualifying" aggravator.

Bottoson v. Moore, 2002 WL 31386790 at 19 (emphasis added).

b. **Justice Pariente's views.**

In Bottoson, Justice Pariente agreed with Justice Shaw that "a prior violent felony conviction meets the threshold requirement of Apprendi as extended to capital sentencing by Ring." Bottoson v. Moore, 2002 WL 31386790 at 22 (Pariente, J., concurring in result only). Accordingly, she too concurred in the denial of habeas relief in Bottoson, saying, "I would deny relief to Bottoson because one of the four aggravating circumstances found in this case was a prior violent felony." Id. Similarly in King, Justice Pariente explained that she concurred in the court's denial of King's petition for habeas relief because "one of the aggravators found in King's case was a 'previous conviction of violent felony.'" King v. Moore, 2002 WL 31386234 at 4.[7]

In her opinion "concur[ring] in result only" in Bottoson, Justice Pariente said, "I believe that we must confront the fact that the implications of Ring are inescapable." Bottoson v. Moore, 2002 WL 31386790 at 22. Later in that opinion, she

[7]She also noted that in Mr. King's case jurors "reached a unanimous (12-0) recommendation of death." Id. This is not the recommendation in Mr. Mordenti's case.

elaborated:

> The crucial question after Ring is "one not of form, but of effect." 122 S.Ct. at 2439. *In effect*, the maximum penalty of death can be imposed only with the additional factual finding that aggravating factors outweigh mitigating factors. *In effect*, Florida juries in capital cases *do not do* what Ring mandates – that is, make specific findings of fact regarding the aggravators necessary for the imposition of the death penalty. *In effect*, Florida juries *advise* the judge on the sentence and the judge *finds* the specific aggravators that support the sentence imposed. Indeed, under both the Florida and Arizona schemes, it is the judge who *independently* finds the aggravators necessary to impose the death sentence.

Bottoson v. Moore, 2002 WL 31386790 at 24 (italics in original).

Thus, it is clear that Justice Pariente believes that the Florida death penalty statute violates the principles enunciated in Ring.[8] Under her reasoning, Mr. Mordenti is entitled to relief since the "prior conviction of a crime violence" aggravator was not present in his case.[9]

c. **Justice Anstead's views.**

In his opinion in Bottoson, Chief Justice Anstead noted that he concurred in that portion of Justice Pariente's

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[8]At one point she stated, "I agree with Justice Lewis that there are deficiencies in our current death penalty sentencing instructions." Bottoson v. Moore, 2002 WL 31386790 at 22. Accordingly, Justice Pariente opined that the standard jury instructions should be changed, as well as the verdict form used in penalty phase proceedings.

[9]As to Mr. King, Justice Pariente also pointed out in Mr. King's case jurors "reached a unanimous (12-0) recommendation of death." King v. Moore, 2002 WL 3138234 at 4. The death recommendation was not unanimous in Mr. Mordenti's case.

opinion discussing "a finding of the existence of aggravating circumstances before a death penalty may be imposed." Bottoson v. Moore, 2002 WL 31386790 at 8 n.18.

In otherwise explaining his view of Ring and its application to the Florida death penalty statute, Chief Justice Anstead stated:

> Thus, Ring requires that the aggravating circumstances necessary to enhance a particular defendant's sentence to death must be found by a jury beyond a reasonable doubt in the same manner that a jury must find that the government has proven all the elements of the crime of murder in the guilt phase. It appears that the provision for judicial findings of fact and the purely advisory role of the jury in capital sentencing in Florida falls short of the mandates announced in Ring and Apprendi for jury fact-finding.

Bottoson v. Moore, 2002 WL 3138670 at 10.[10]

In his opinion in King v. Moore, Chief Justice Anstead specifically concurred in Justice Pariente's opinion stating her reasons for concurring in the denial of relief to Mr. King. Thus, he found the presence of the "prior conviction of a crime of violence" aggravating circumstance and the unanimous death recommendation determinative in that instance.

The circumstances present in Bottoson and King which

[10]Chief Justice Anstead also indicated, "another factor important to my decision to concur in denying relief [ ] is that the U.S. Supreme Court has specifically denied Bottoson's petition for review and lifted the stay it previously granted as to his execution." Bottoson v. Moore, 2002 WL 31386790 at 7-8 n.17. However, that circumstance is not present in Mr. Mordenti's case, and thus, a different result is warranted.

caused Chief Justice Anstead to vote to deny those petitioners relief are not present in Mr. Mordenti's case. Inferentially, it would seem that he, like Justices Shaw and Pariente, would vote to grant Mr. Mordenti relief under Ring v. Arizona.

3. **JURORS' AWARENESS OF THE IMPACT OF THEIR RECOMMENDATION.**

Mr. Mordenti's jury was specifically instructed that its role was merely to make a recommendation by a majority vote. The jury was never told that its recommendation was binding in any way.[11] Under the circumstances, the jurors' sense of responsibility for determining Mr. Mordenti's sentence was substantially diminished.

a. **Justice Lewis's views.**

Justice Lewis explained in his view that "the validity of jury instructions given in [Bottoson's] case should be addressed in light of [Bottoson's] facial attack upon Florida's death penalty scheme on the basis of the holding in Ring v. Arizona." Bottoson v. Moore, 2002 WL 31386790 at 29.[12] According to Justice Lewis:

> [I]n light of the dictates of Ring v. Arizona, it necessarily follows that Florida's standard penalty phase jury instructions may no longer be valid and are certainly subject to further analysis under the United States Supreme Court's Caldwell v.

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[11]The jury was only told it would be given great weight.

[12]Justice Lewis acknowledged that Ring v. Arizona has application to Florida's death penalty statute when he wrote, after Ring, a jury's "life recommendation must be respected." Bottoson v. Moore, 2002 WL 31386790 at 26. He concluded that as to jury overrides in favor of death, Florida law and Ring are in "irreconcilable conflict." Id.

Mississippi, 472 U.S. 320 (1985), holding. Bottoson v. Moore, 2002 WL 31386790 at 28. Pursuant to this view, Justice Lewis proceeded in his opinion to carefully review the *voir dire* proceedings and the jury instructions, thereby suggesting that a case-by-case analysis is warranted in determining whether any death-sentenced individuals are entitled to post-conviction relief in the light of Ring v. Arizona. In his opinion, Justice Lewis concluded, "there was a tendency to minimize the role of the jury, not only in the standard jury instructions, but also in the trial court's added explanation of Florida's death penalty scheme." Id. at 30. However, he found the standard jury instructions and judicial commentary were not so flawed in Mr. Bottoson's case to warrant reversal. Justice Lewis explained, "although the standard jury instructions may not be flawed to the extent that they are invalid or require a reversal **in this case**, such instructions should now receive a detailed review and analysis to reflect the factors which inherently flow from Ring." Id. (emphasis added). Clearly, Justice Lewis's position carries with it the unstated inference that a reversal will be required in some cases where the proper analysis is conducted and it is determined that the minimization of the jury's role exceeded that occurring in Bottoson.

The circumstances of Mr. Mordenti's case are much more extreme than those Justice Lewis addressed in Bottoson v. Moore. The jury repeatedly heard during the voir dire

examination that their penalty phase role was to render a recommendation. They were told that the recommendation was not binding upon the judge. They were told that the decision as to what sentence to impose was the judge's decision. In the judge's last remarks before the jury retired, he reminded them:

> **As you have been told**, the final decision as to what punishment should be imposed is a responsibility of the Judge; however, it is your duty to follow the law which will now be given to you by the Court and to render to the Court an advisory sentence.

(R. 1489)(emphasis added).

Under the analysis that Justice Lewis requires, Mr. Mordenti is entitled to relief. The diminution of the juror's role in Mr. Mordenti's case far exceeded what Justice Lewis noted was present in Bottoson.

b. **Justice Pariente agrees.**

In her opinion in Bottoson v. Moore, Justice Pariente expressed her agreement with Justice Lewis: "I agree with Justice Lewis that there are deficiencies in our current death penalty sentencing instructions." Bottoson v. Moore 2002 WL 31386790 at 22.

3. Bottoson and King Support Granting Relief In Mr. Mordenti's Case.

Under the analyses employed by Chief Justice Anstead, Justice Shaw, Justice Pariente, and Justice Lewis, Mr. Mordenti's sentence of death stands in violation of the Sixth and Eighth Amendments. The circumstances present in Bottoson

and King that caused those justices to concur in the denial of post-conviction relief are not present here. Habeas relief should issue. This Court should vacate the sentence of death and order a new penalty phase proceeding.

4. Other Errors in Light of Ring.

Additionally Mr. Mordenti's death sentence was 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. Fla. Sat. Sec 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. Ring at 2432("Capital defendants. . .are entitled to a jury determination of any fact the legislature conditions an increase in their maximum punishment.") In Mr. Mordenti's case, the judge gave the following preliminary instruction:

> You are instructed that this evidence is presented in order that you might determine first whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty and, second, **whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances**, if any.

(R. 1367)(emphasis added).

In closing penalty phase argument the prosecutor told the jury:

> But I submit to you that **they [defense] have not overcome the vast weight of the aggravating factors that the state has presented to you** in the trial of this case.

(R. 1457)(emphasis added) and:

> So we have sat back and everyone has listened to what they [defense] have presented in mitigation and it doesn't overcome the facts of this murder. **It does not overcome the aggravating factors we have in this case**.

(R. 1459)(emphasis added).

The Court then gave the jury her final instructions:

> It is your duty to follow the law that will now be given to you by this Court and render to this Court an advisory sentence based on your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and **whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.**

(R. 1490)(emphasis added)and:

> If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole for twenty-five years. Should you find sufficient aggravating circumstances do exist, **it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances**.

(R. 1492)(emphasis added).

The Due Process Clause of the Fourteenth Amendment requires the State to prove beyond a reasonable doubt every fact necessary to constitute a crime. In re Winship, 397 U.S.

358 (1970). The existence of "sufficient aggravating circumstances" that outweigh the mitigating circumstances is an essential element of death-penalty-eligible first degree murder because it is the sole element that distinguishes it from the crime of first degree murder, for which life is the only possible punishment. Fla. Stat. Secs. 775.082, 921.141. For that reason, Winship requires the prosecution to prove the existence of that element beyond a reasonable doubt. Mr. Mordenti's jury was told otherwise. The instructions given to Mr. Mordenti's jury violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Sixth Amendment's right to trial by jury because it 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 Mr. Mordenti to prove that the mitigating circumstances outweigh sufficient aggravating circumstances. Mullaney v. Wilbur, 421 U.S. 684, 698 (1975). Mr. Mordenti's sentencing judge employed the same unconstitutional standard in imposing the death sentence:

> I've weighed the aggravating and the mitigating both statutory and non-statutory circumstances outlined, as well as any other mitigation that was offered by the defendant. And **I find that the mitigating circumstances in this case do not outweigh the aggravating circumstances**.

(R. 1574) (emphasis added).

Mr. Mordenti's death sentences are also 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.

Mr. Mordenti was indicted on 1 count of premeditated murder. The indictment failed to charge the necessary elements of capital first degree murder (R. 1591-1593).

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. [13] Ring v. Arizona, 122 S.Ct. 2428 (2002), held that a death penalty statute's "aggravating factors operate as 'the functional equivalent of an element of a greater offense.'" Ring, at 2441 (quoting Apprendi, 530 U.S. at 494, n. 19).

In Jones, the United States Supreme Court noted that

[13]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.

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

> 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 sections 3591 and 3592(c), Florida's death penalty statute, Florida Stats. §§ 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. 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), the Florida Supreme 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 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". Gray, 435 So. 2d at 818. Finally, in Chicone v. State, 684 So. 2d 736, 744 (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." 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. Mordenti 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- in fact- is

an archetypical reason for the constitutional requirement of neutral review of prosecutorial intentions. 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. State v. Gray, supra, 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. Mordenti "in the preparation of a defense" to a sentence of death. 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. Mordenti's right under Article I, Section 15 of the Florida Constitution, and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution due process were violated. Mr. Mordenti's death sentence should be vacated.

5. Conclusion

Based on the foregoing, Mr. Mordenti respectfully requests that his sentence of death as well as the advisory

sentence be vacated in light of Ring v. Arizona and a life sentence imposed. At the very least, a re-sentencing proceeding that comports with the Sixth Amendment as explained by Ring v. Arizona is required.

CLAIM III

MR. MORDENTI WAS DENIED HIS RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, WHEN THE PROSECUTOR IMPERMISSIBLY SUGGESTED TO THE JURY THE LAW REQUIRED THAT IT RECOMMEND A SENTENCE OF DEATH. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON DIRECT APPEAL.

During voir dire, the prosecutor repeatedly asked prospective jurors if they could vote for a sentence of death if the aggravating circumstances required or called for that sentence:

> . . . sometimes there are those murders that are just particularly cold, calculated, premeditated and cruel and **justice demands** that we come back before you and do this (emphasis added). And this is one of those cases.

(R. 1369) and:

> The people of the State of Florida now come before you and urge you to urge Judge Bucklew to use that sword to impose capital punishment, the death penalty, on this defendant for what he did **because justice demands it**. There is **no alternative** in this case whatsoever for that murder. **There is no alternative**.

(R. 1456) (emphasis added) and:

> Have the courage of your swift and decisive conviction in this case. None of us – none of us like this. None of us enjoy having to be here doing this, but in this case, **justice demands it**. **There is no alternative.** Have the courage that your

conviction showed in this case.

(R. 1468) (emphasis added) and:

> Nothing that the defense can say, nothing that the defense can do can mitigate this murder. Any killing of a human being is atrocious. Any killing of a human being is aggravating. Nothing mitigates the killing of a human being, but absolutely nothing at all mitigates this. Nothing. Nothing mitigates this.

(R. 1468-1469).

First, in no instance does the law require that a death sentence be imposed. Second, in a capital sentencing proceeding, the law does not require or call for the jury to recommend a sentence of death over life imprisonment, or vice versa; rather, the law requires the jury to determine the existence of aggravating and mitigating circumstances, and thereafter, weigh them against each other. In other words, the law requires the jury to consider the evidence introduced in both the guilt and sentencing phases of the trial, and after having done so, recommend an appropriate sentence.

The comments of the prosecutor misguided the jury into thinking that the law required one sentence over the other, when in fact, the proper question is whether, based upon the evidence regarding aggravating and mitigating circumstances, a juror would consider the appropriateness of a death recommendation.

The prosecutor mislead the jury into believing the recommendation of the jury was a simple counting process. The prosecutor implied that the jury should merely compare the

number of aggravating circumstances in relation to the number of mitigating circumstances (R. 1458). If the number of aggravating circumstances exceeded the number of mitigating circumstances, the prosecutor suggested to the jury the law required or called for a recommendation of death (R. 1468, 1469). The prosecutor told the jury flatly "there is no alternative." This is an incorrect statement of the law. Under the sentencing scheme in Florida the jury has complete discretion in choosing between a life imprisonment or death recommendation. "Mercy may be a part of that discretion." Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985). The argument in Mr. Mordenti's case is precisely the type of argument that violates due process and the Eighth Amendment. See Drake v. Kemp, 762 F.2d 1449, 1458-61 (11th Cir. 1985) (en banc). This misconduct is even more compelling because it was the State Attorney asking the questions: "Arguments delivered while wrapped in the cloak of state authority have a heightened impact on the jury." Id. at 1459. Prosecutorial commentary as evidenced in Mr. Mordenti's case has been held to render a sentence of death fundamentally unreliable and unfair. Id. at 1460 ("[T]he remarks' prejudice exceeded even its factually misleading and legally incorrect character . . . ."). See also Potts v. Zant, 734 F.2d 526, 536 (11th Cir. 1984) (because of improper prosecutorial argument, the jury may have "failed to give its decision the independent and unprejudiced consideration the law requires"); Wilson v. Kemp, 777 F.2d

621, 627-28 (11th Cir. 1985) ("When core Eighth Amendment concerns are substantially impinged upon[,] . . . it is understandable that confidence in the jury's decision will be undermined. . . . We conclude that the sentencing phase was fundamentally unfair."); Newlon v. Armontrout, 885 F.2d 1328, 1338 (8th Cir. 1989) (quoting Coleman v. Brown, 802 F.2d 1227, 1239 (10th Cir. 1986)) ("'[a] decision on the propriety of a closing argument must look to the Eighth Amendment's command that a death sentence be based on a complete assessment of the defendant's individual circumstances . . . and the Fourteenth Amendment's guarantee that no one be deprived of life without due process of law.'") (citations omitted). This Court has recognized that "death required" arguments are a misstatement of the law. Heynard v. State, 689 So. 2d 239 (Fla. 1996).

Trial counsel failed to object and move for mistrial. Mr. Mordenti was denied his right to effective representation of counsel as guaranteed by the United States Constitution. See Strickland v. Washington, 466 U.S. 668 (1984). This error was apparent on the record and appellate counsel was ineffective for failing to raise it on direct appeal. See e.g. Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987)(recognizing exceptions where counsel may successfully raise ineffectiveness on direct appeal when apparent on the record). Appellate counsel
renders ineffective assistance of counsel when it is established: 1) that appellate counsel's performance was

deficient because the alleged omissions are of such a magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of processionally acceptable performance, and 2) that petitioner was prejudiced because appellate counsel's deficiency compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. See Rutherford, v. Moore, 774 So. 2d 637, 643 (Fla. 2000).

Here appellate counsel's performance was deficient. The law supporting the claim that the prosecutor's argument that told the jury that death was required was in existence at the time of Mr. Mordenti's appeal and could have been raised. Mr. Mordenti was prejudiced because this Court did not address this issue on appeal. The improper death required argument was so pervasive in the prosecutor's argument that confidence in the jury applying the correct law is undermined and thus, the death sentence is not worthy of confidence. Additionally, in Mr. Mordenti's case, the pervasive emphasis the prosecutor attributed to its death required argument that went uncorrected, reached down into the validity of the Mr. Mordenti's death sentence and constitutes fundamental error. Thus, the death sentence should be vacated.

CLAIM IV

JUROR MISCONDUCT OCCURRED IN THE GUILT AND PENALTY PHASES OF MR. MORDENTI'S TRIAL IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES

CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

During the penalty phase of Mr. Mordenti's trial, juror misconduct was revealed. Juror Baker had discussions with Jimmy Muench, an attorney, for whom he was a witness in a civil trial Juror Baker discussed his jury duty on Mr. Mordenti's case with Mr. Muench. According to state attorney Karen Cox, she and her husband Nick Cox, the prosecutors in this case were friends with Mr. Muench. Juror Baker also revealed that he heard information through conversations at work that Mr. Mordenti had been previously represented by Barry Cohen (R. 1321-1329). Juror Baker was given specific instructions not to discuss her service on the jury in this case (R. 1325). Despite the instruction, he had a discussion with a friend of the prosecutors. Misconduct occurred when he violated the judge's instructions. This misconduct is of such a character that at the very least, it raises a potential of prejudice. Amazon v. State, 487 So. 2d 8, 11 (Fla. 1986) and is presumptively prejudicial. Russ v. State, 95 So. 2d 94, 600-601 (Fla. 1957). Accordingly Mr. Mordenti is entitled to a new trial. Furthermore, Juror #8, Mr. Johnston, also revealed that through conversations at his place of employment he learned that the co-defendant Larry Royston had killed himself (R. 1342).

The juror misconduct that occurred in Mr. Mordenti's trial violated his Sixth, Eighth and Fourteenth Amendment rights and corresponding provisions of the Florida Constitution. Defense counsel was ineffective for failing to request removal and

substitution of these jurors and appellate counsel was ineffective for failing to raise this issue on direct appeal as it was apparent on the record and supported in law at the time of direct appeal. Mr. Mordenti is entitled to a new trial.

CLAIM V

FUNDAMENTAL ERROR OCCURRED AND MR. MORDENTI'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BECAUSE NO RELIABLE TRANSCRIPT OF HIS CAPITAL TRIAL EXISTS, RELIABLE APPELLATE REVIEW WAS AND IS IMPOSSIBLE, THERE IS NO WAY TO ENSURE THAT WHICH OCCURRED IN THE TRIAL COURT WAS OR CAN BE REVIEWED ON APPEAL, DUE TO OMISSIONS IN THE RECORD AND THE JUDGMENT AND SENTENCE MUST BE VACATED. APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO TAKE PROPER ACTION TO ENSURE THE RECORD WAS COMPLETE. MR. MORDENTI WAS PREJUDICED AS A RESULT.

The due process constitutional right to receive trial transcripts for use at the appellate level was acknowledged by the Supreme Court in Griffin v. Illinois, 351 U.S. 212 (1956). A death sentence cannot stand unless there has been complete, meaningful appellate review. Parker v. Dugger, 498 U.S. 398 (1991). An accurate trial transcript is crucial for adequate appellate review. The Sixth Amendment also mandates a complete transcript. In Hardy v. United States, 375 U.S. 277, 288 (1964), Justice Goldberg, in his concurring opinion, wrote that since the function of appellate counsel is to be an effective advocate for the client, counsel must be equipped with "the most basic and fundamental tool of his profession . . . the complete trial transcript . . . anything short of a complete transcript is incompatible with effective appellate advocacy."

Complete and effective appellate advocacy requires a complete trial record. A trial record should not have missing portions. In

Mr. Mordenti's case, the trial record does not include a hearing held on October 10, 1990 or a transcription of audio tapes played to the jury. At times, discussions at sidebar were also not recalled in the record. With the record provided, it is impossible to know what actually occurred. Mr. Mordenti is prejudiced in his ability to demonstrate the effect of the omissions due to the fact that he has been denied the content of the omissions.

Entsminger v. Iowa, 386 U.S. 748 (1967), held that appellants are entitled to a complete and accurate record. Lower courts rely upon Entsminger. The concurring opinion in Commonwealth v. Bricker, 487 A.2d 346 (Pa. 1985), citing Entsminger, condemned the trial court's failure to record and transcribe the sidebar conferences so that appellate review could obtain an accurate picture of the trial proceedings.

Entsminger was cited in Evitts v. Lucey, 105 S. Ct. 830 (1985), in which the Supreme Court reiterated that effective appellate review begins with giving an appellant an advocate, and the tools necessary to do an effective job.

Finally, in Gardner v. Florida, 430 U.S. 349 (1977), where the defendant was not allowed to view a confidential presentence report, the Supreme Court held that even if it was proper to withhold the report at trial, it had to be part of the record for appeal. The record must disclose considerations which motivated the imposition of the death sentence. "Without full disclosure of the basis for the death sentence, the Florida capital sentencing procedure would be subject to defects under Furman v. Georgia, 408 U.S. at 361."

The issue is whether Mr. Mordenti should be made to suffer the ultimate sentence of death where he did not have the benefit of a constitutionally guaranteed review of a bona fide record of the trial proceedings. Fla. Const. art. V, sec. 3(b)(1). See Delap v. State, 350 So. 2d 462, 463 (Fla. 1977); Dobbs v. Zant, 113 S. Ct. 835 (1993). This Court has emphasized that "[t]o satisfactorily perform our responsibility we must be able to discern from the record that the trial judge fulfilled that responsibility" of acting with procedural rectitude. Lucas v. State, 417 So. 2d 250 (Fla. 1982).

The record in this case is incomplete and unreliable. Confidence in the record is undermined. Mr. Mordenti was denied due process, a reliable appellate process, effective assistance of counsel on appeal, and a meaningful and trustworthy review of his conviction and sentence of death. Mr. Mordenti's statutory and constitutional rights to review his sentence by this Court in the State upon a complete and accurate record, in violation of the Sixth, Eighth and Fourteenth Amendments.

The circuit court is required to certify the record on appeal in capital cases, Fla. Stat. Ann. sec. 921.141(4), Fla. Const. art. 5, sec. 3(b)(1). When errors or omissions appear, re-examination of the complete record in the lower tribunal is required. Delap v. State, 350 So. 2d 462 (Fla. 1977). Habeas relief is proper.

CLAIM VI

THE TRIAL COURT ERRONEOUSLY INSTRUCTED MR. MORDENTI'S JURY ON THE STANDARD BY WHICH THEY MUST JUDGE EXPERT TESTIMONY. THE JURY MADE DECISIONS OF LAW THAT SHOULD HAVE BEEN WITHIN THE PROVINCE OF THE COURT. APPELLATE COUNSEL WAS INEFFECTIVE FOR

FALLING TO RAISE THIS ISSUE ON DIRECT APPEAL. MR. MORDENTI WAS PREJUDICED A RESULT, THE JURY'S GUILT VERDICT AND RECOMMENDATION THAT MR. MORDENTI BE SENTENCED TO DEATH ARE CONSTITUTIONALLY UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The trial court instructed the jury on expert witnesses as follows:

> There were expert witnesses who testified. Expert witnesses are like other witnesses, with one exception. The law permits an expert witness to give his opinion.
>
> However, an expert's opinion is only reliable when given on a subject about which you believe him to be an expert.
>
> Like other witnesses, you may believe or disbelieve all or any part of an expert's testimony.

(R. 1284-1285) (emphasis added). Defense counsel did not object to this instruction. However here, the error was apparent on the record and appellate counsel should have raised the issue and trial counsel’s ineffectiveness for failing to object.

The Court's instruction was an erroneous statement of law. The decision of whether a particular witness is qualified as an expert to present opinion testimony on the subject at issue is to be made by the trial judge alone. Ramirez v. State, 651 So. 2d 1164 (Fla. 1995) (citing Johnson v. State, 393 So. 2d 1069, 1072 (Fla. 1980), cert. denied, 454 U.S. 882 (1981)). The Court's instruction here permitted the jury to decide whether an expert was truly expert in the field in which the Court had already qualified him. In addition to

judging his credibility, the jury was permitted to judge his expertise. That determination belongs solely to the judge. This error was exacerbated by the State's failure to tender witnesses as experts who were allowed to give opinion testimony without the Court declaring the witness to be qualified as an expert. Among these witnesses were Gerald Wilkes, Jack Riley, and Michael Malone. The Court erred when it permitted the jury to hear opinion testimony of these witnesses. Trial counsel's performance was ineffective as was appellate counsel's for failing to raise this issue. The prejudice is manifest. Relief is proper.

CLAIM VII

THE PROSECUTOR'S INFLAMMATORY AND IMPROPER COMMENTS AND ARGUMENTS RENDERED MR. MORDENTI'S DEATH SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE.

At the penalty phase of Mr. Mordenti's trial, the prosecutors injected all manner of impermissible, improper, and inflammatory matters into the proceedings. Through their comments and arguments, the prosecutors urged consideration of improper matters, misstated the law, and injected emotion into the proceedings. The prosecutor's arguments were fundamentally unfair and deprived Mr. Mordenti of due process. Appellate counsel rendered ineffective assistance of counsel in failing to raise this issue on direct appeal, as it was apparent on the record. Mr. Mordendi has been prejudiced as a

result.

During the state's penalty phase closing argument, the state implied that the jury should not consider mercy or sympathy when deciding Mr. Mordenti's sentence. Mercy based upon mitigating evidence was permissible. Wilson v. Kemp, 777 F.2d 621, 624 (11th Cir. 1985). The State inflamed the passions of the jury for the victim. This closing argument "improperly appeal[ed] to the jury's passions and prejudices." Cunningham v. Zant, 928 F.2d 1006, 1020 (11th Cir. 1991). Such remarks prejudicially affect the substantial rights of the defendant when they "so infect the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 647 (1974).

This Court has called such improper prosecutorial commentary "troublesome," Bertolotti v. State, 476 So. 2d 130, 132 (Fla. 1985), and when improper conduct by the prosecutor "permeates" a case, as it did here, relief is proper. Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990).

The whole tenor of the state's closing argument in the penalty phase was an appeal to emotion rather than to reason. During closing argument, the prosecutor emphasized the gruesome photographs of Thelma Royston to inflame the minds and passions of the jury to recommend the death penalty to avenge the crime. For example, the prosecutor argued:

> What weight do we give the eyes of Thelma Royston in these pictures. What weight do you give the fear the victim experienced in those eyes?

(R. 1466-1467).

In urging the jury to recommend the penalty of death, the prosecutor repeatedly strayed from arguments relevant to aggravating and mitigating circumstances, engaging in oratory deliberately intended to arouse the prejudice and passions of the jury. The prosecutor exhorted the jury to recommend the death penalty because it was required and "there is no alternative" (R. 1468). The prosecutor's argument was egregious, inflammatory and unfairly prejudicial such that a mistrial was is the only proper remedy. Garron v. State, 528 So. 2d 353 (Fla. 1988).

The prosecutor concluded his comments by again urging the jury to recommend death based on the non-statutory aggravating circumstances:

> What weight do you give to the fact that Thelma Royston died on her own property. And one of the – one of her own buildings and the horse barn where she kept the horses that she loved so much. What weight do you give the fact that she died in the safety of her land?

(R. 1465)and:

> To give the defendant life imprisonment with the possibility of parole after twenty-five years is a reward in this case. The defense may argue to you well, in twenty-five years, he's going to be seventy-five years old, but do you know what happens over that twenty-five years? Michael Mordenti looks forward to the point where he may be paroled. He has that anticipation. He gets to look forward to that.
> He doesn't deserve it. Michael Mordenti has forfeited
> the hope and the possibility that he can be paroled in twenty-five years. He's forfeited that right. He doesn't deserve it.

(R. 1467-1468).

The prosecution went on to impermissibly argue and question Mr. Mordenti's value to the rest of society and implied that it was their social responsibility to recommend death. The prosecutor argued:

> ....in weighing the value of someone's life, you need to see what the value of that person's life is to the rest of society. What value does a cold-blooded murderer have to the rest of society?

(R. 1467). In addition to urging the jurors to vote for death on the basis of impermissible factors, the prosecutor repeatedly told the jurors that the mitigating factors presented by Mr. Mordenti were not legitimate considerations. The prosecutor argued: “Nothing that the defense can say, nothing that the defense can do can mitigate this murder.” (R. 1469).

The prosecutor distorted Mr. Mordenti's penalty phase with frequent improper commentary and actions, thus destroying any chance of a fair penalty determination. These arguments and actions were intended only to inflame the jury. The remarks were of the type that this Court has found "so egregious, inflammatory, and unfairly prejudicial that a mistrial was the only proper remedy." Garron v. State, 528 So. 2d 353, 358 (Fla. 1988). This is a case like Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990), where this Court ordered a new trial, commenting:

> We also are persuaded that [the Defendant] was denied a fair trial by the prosecutorial misconduct

> that permeated this case. . . . While isolated incidents of overreaching may or may not warrant a mistrial, in this case the cumulative effect of one impropriety after another was so overwhelming as to deprive [the Defendant] of a fair trial.

Nowitzke, 572 So. 2d at 1350. Here, the prosecutor's arguments went beyond a review of the evidence and permissible inferences. They were intended to overshadow any logical analysis of the evidence and to generate an emotional response, a clear violation of Penry v. Lynaugh, 109 S. Ct. 2934 (1989). Aggravating circumstances specified in Florida's capital sentencing statute are exclusive, and no other circumstances or factors may be used to aggravate a crime for purposes of the imposition of the death penalty. Miller v. State, 373 So. 2d 882 (Fla. 1979). The prosecutor's presentation of wholly improper and unconstitutional nonstatutory aggravating factors starkly violated the Eighth Amendment, and the sentencer's consideration and reliance upon nonstatutory aggravating circumstances prevented the constitutionally required narrowing of the sentencer's discretion. See Stringer v. Black, 112 S. Ct. 1130 (1992); Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988). As a result, these impermissible aggravating factors evoked a sentence that was "an unguided emotional response," a clear violation of Mr. Mordenti's constitutional rights. Penry v. Lynaugh, 108 S. Ct. 2934 (1989). Arguments such as those presented here have been long-condemned as violative of due

process and the Eighth Amendment. See Drake v. Kemp, 762 F.2d 1449, 1458-61 (11th Cir. 1985)(in banc). Such arguments render a sentence of death fundamentally unreliable and unfair. Drake, 762 F.2d at 1460. ("[T]he remark's prejudice exceeded even its factually misleading and legally incorrect character ...."); Potts v. Zant, 734 F.2d 526, 536 (11th Cir. 1984)(because of improper prosecutorial argument, the jury may have "failed to give its decision the independent and unprejudiced consideration the law requires"). The proceedings were contaminated with irrelevant, inflammatory, and prejudicial considerations. The prosecutor's argument also constitutes fundamental error as it tainted the validity of the jury's recommendation. As a result Mr. Mordenti's death sentence is neither fair, reliable nor individualized. Mr. Mordenti's death sentence should be set aside.

CLAIM VIII

FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE BECAUSE IT FAILS TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY, AND IT VIOLATES THE CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND PROHIBITING CRUEL AND UNUSUAL PUNISHMENT.

Florida's capital sentencing scheme denies Mr. Mordenti his right to due process of law, and constitutes cruel and unusual punishment on its face and as applied in this case. Florida's death penalty statute is constitutional only to the extent that it prevents arbitrary imposition of the death penalty and narrows application of the penalty to the worst

offenders. See Proffitt v. Florida, 428 U.S. 242 (1976). The Florida death penalty statute, however, fails to meet these constitutional guarantees, and therefore violates the Eighth Amendment to the United States Constitution.

The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors, Mullaney v. Wilbur, 421 U.S. 684 (1975), and does not define "sufficient aggravating circumstances." Further, the statute does not sufficiently define for the consideration each of the aggravating circumstances listed in the statute. See Godfrey v. Georgia, 446 U.S. 420 (1980). These deficiencies lead to the arbitrary and capricious imposition of the death penalty and violate the Eighth Amendment to the United States Constitution.

Florida's capital sentencing procedure does not have the independent reweighing of aggravating and mitigating circumstances required by Proffitt v. Florida, 428 U.S. 242 (1976). The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner, and juries receive unconstitutionally vague instructions on the aggravating circumstances. See Godfrey v. Georgia; Espinosa v. Florida, 112 S. Ct. 2926 (1992).

Florida law creates a presumption of death if a single aggravating circumstance is found. This creates a presumption

of death in every felony murder case, and in nearly every premeditated murder case. Once an aggravating factor is found, Florida law provides that death is presumed to be the appropriate punishment, which can only be overcome by mitigating evidence so strong as to outweigh the aggravating factor. This systematic presumption of death does not satisfy the Eighth Amendment's requirement that the death penalty be applied only to the worst offenders. See Furman v. Georgia, 408 U.S. 238 (1972); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988); Richmond v. Lewis, 113 S. Ct. 528 (1992). To the extent trial counsel failed to properly raise this issue, defense counsel rendered prejudicially deficient assistance. See Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990) and appellate counsel was ineffective for failing to raise it on appeal. Counsel is mindful of this Court's opinions to the contrary and raises this issue for purposes of preservation.

CONCLUSION AND RELIEF SOUGHT

For all the foregoing reasons, Mr. Mordenti respectfully requests 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 has been furnished by United States Mail, first-class postage prepaid to Robert Landry, Assistant Attorney General, this 19th day of December, 2002.

CERTIFICATE OF FONT

This is to certify that this Initial Brief has been produced in a 12 point Courier type, a font that is not proportionately spaced.

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